

## Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective

JUSTICE ROBERT F. UTTER\*

DAVID C. LUNDSGAARD\*\*

### I. INTRODUCTION

The demise of the Soviet Empire has sparked a renaissance in comparative social science and legal scholarship. Since emerging from the Soviet shadow, the developing nations of Central and Eastern Europe<sup>1</sup> have increasingly looked west for ideas and precedents in establishing the foundations of their new societies. Western ideas regarding the structure of the economy, the relationship between the various branches of government, and the relationship of the state to the individual have come under scrutiny in an attempt to transpose the experience the West has to offer onto the traditions and institutions of the emerging nations.<sup>2</sup> At the same time, Western scholars have

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\* Justice, Washington State Supreme Court, Olympia, WA; B.S., University of Washington, 1951; L.L.B., University of Washington, 1954.

\*\* Associate, Dorsey & Whitney, Minneapolis, MN; former Law Clerk to Justice Robert F. Utter, Washington State Supreme Court; B.A., University of Washington, 1988; J.D., Yale Law School, 1992. The authors would like to express their thanks to Professor Joachim Herrmann for his helpful comments on an earlier draft of this Article and to Lori Lynn Phillips for her editorial assistance.

<sup>1</sup> The nations now arising out of the fall of the Soviet Union include others than those in Europe. This Article, however, is limited to those nations whose traditions and futures are more European than Asian. From a comparative perspective, the problems faced by Asiatic nations like Kirghizstan may be substantially different than those faced by European nations such as Ukraine. To take the most obvious example, the nations of the Central Asian steppes are likely to be heavily influenced by Muslim legal traditions, an influence unlikely to make itself felt in the new European nations.

<sup>2</sup> In addition to comparative analysis of the domestic experiences of the Western nations, the new states have also found notions of customary and multilateral international law to be useful in structuring their post-Soviet societies. See Matthias Hartwig, *The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries*, 7 AM. U. J. INT'L L. & POL'Y 449, 457 (1992) ("After having

renewed their own comparative studies, both to provide assistance to the new states and in a reflective attempt to understand the nature of the end of the Cold War.

Comparative scholarship has a great deal to offer the new nations of Central and Eastern Europe as they struggle to found free and stable democracies on the rubble of the Soviet dictatorship. Of course, it would be a sign of the most extreme hubris for those who are part of the Western tradition to believe either that our largely idiosyncratic systems of social organization are inherently superior to the possible alternatives, or that the valuable aspects of our culture can be easily transferred into societies of which we have only the dimmest understanding. For those new nations of Central and Eastern Europe that are interested in democratic self-government, however, the experience of the West can be a fountain of potentially useful information at both the theoretical and practical levels. The diversity of the Western democracies offers a broad opportunity for the new nations to benefit from the comparative analysis of governmental institutions and practices. By examining the various choices made by nations like Great Britain, France, Germany, and the United States, much can be learned about the range of alternatives that exists within the framework of democratic self-government. Furthermore, by investigating the practical consequences of those choices, it is possible to develop some concept of the factors that bear on the relative successes and failures of the Western nations.

This Article represents a limited effort in this direction. Its goal is to examine some of the comparative aspects of the institution of judicial review and relate them to a number of the choices presently faced by the developing nations of Central and Eastern Europe. In pursuing this objective, the Article proceeds in three parts. Because judicial review is essentially a judicial function, Part I sketches three of the competing legal-judicial traditions that are likely to be relevant to the new states. It also develops insight into the ways in which the impact of these legal-judicial traditions may manifest themselves in terms of the attitudes and capabilities of cultures and governments with respect to judicial review. Part II applies some of the insight gained from the examination of the various legal-judicial traditions to several of the important questions of practical institutional design associated with judicial review. Finally, Part III steps back from the details of judicial review to discuss briefly the broader question of the relationship of judicial review to democracy as it is understood in Western thought.

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lost their ideological identity, Central and Eastern European countries are attempting to find a new ground on which they can establish their legal structure by referring to international standards.”).

An article of this limited scope cannot attempt to provide complete answers to the many questions that judicial review raises. At best, a comparative analysis of judicial review can merely highlight the similarities and differences existing in institutions among nations and possibly offer some insight into the solutions available. The actual form that judicial review takes in any given state will depend on a variety of local factors, none of which can be dealt with in an article of this length. In Professor Mauro Cappelletti's words, judicial review is dependent upon "contingent variables such as a given society's history and traditions, the particular demands and aspirations of that society, its political structures and processes, and the kind of judges it has produced."<sup>3</sup>

Despite the impossibility of formulating precise answers regarding the scope and shape of judicial review in any particular society, a comparative analysis of judicial review does suggest one tentative conclusion with regard to the new nations of Central and Eastern Europe. The analysis in this Article indicates the existence of a profound tension between the desires of the new states with respect to the protection of individual rights and the capabilities of those nations in fulfilling these goals. In reaction to well-known deficiencies in the performance of the prior Communist governments, particularly with respect to individual rights, many of the new nations are eager to provide a broad array of civil and political rights to their citizens. However, the institutional capabilities for the *judicial* protection and enforcement of those rights are often lacking. As a result, decisions with respect to the appropriate form of judicial review may be caught between the Scylla of overly ambitious statements of rights and judicial impotence in protecting those rights and the Charybdis of failing to protect certain rights at all. In order to provide protection of an adequate menu of individual rights in the face of inadequate judicial resources, therefore, the new states will have to find or create means beyond simple judicial review for alternative methods of guaranteeing individual constitutional rights.

## II. LEGAL TRADITIONS OF JUDICIAL ACTION

In approaching comparative analysis of an institution as varied and complex as that of judicial review, it is useful to be clear about the definition of the institution under inspection. "Judicial review" is defined as any judicial action that involves the review of an inferior legal norm for conformity with a higher one, with the implicit possibility that the reviewing court may invalidate or suspend the inferior norm if necessary or desirable. This definition of

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<sup>3</sup> Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 411-12 (1980).

judicial review includes both review of legislatively enacted statutes as well as review of administrative and executive decrees for compliance with constitutional principles. It is also broad enough to encompass the practice of reviewing administrative and executive actions for compatibility with controlling statutes, though the focus of this Article is chiefly on constitutional judicial review. While the definition we employ is quite broad, the practices that it encompasses are sufficiently similar to be amenable to comparison in analyzing the characteristics of different systems of judicial review.

The chief distinguishing characteristic of judicial review is that it is a function performed only by judges and is thus a peculiarly legal institution of government. Whether the focus of judicial review is on statutes for conformity with constitutional principles or on administrative activity for consistency with statutory authority, judicial review is at its core an exercise of judicial authority. The most significant of the many variables affecting judicial review for a given nation or culture will therefore be its broader notions about the manner in which judges engage in decisionmaking and the relationship of those decisions to the rest of government.

Notions about the proper role of the judiciary, even within the Western tradition, are not uniform across nations and cultures. Different legal traditions entertain substantially different conceptions of the judicial task, and these divergences have important consequences in terms of the institutional structures that are compatible with the various forms of judicial review. Differences in legal traditions also have historical significance with respect to the resources that may be available for the development of new forms of judicial review. A constitutional system may be limited in its attempt to adopt a form of judicial review that is substantially at odds with its historical underpinnings. For these reasons, an examination of the legal-historical traditions that are relevant to the new nations of Central and Eastern Europe is the most appropriate place to begin a comparative analysis of judicial review.

In surveying the various traditions that may have a significant impact on the new nations of Central and Eastern Europe, three particular strains of legal thought and practice can be identified. The civil-law system, exemplified by nations like Germany and France, is the predominant system on the continent of Europe. It will necessarily influence developments in the new states. The socialist legal tradition, while largely eliminated as an explicit source of policy, will also be a source of influence. Not only does the socialist tradition limit the practical ability of the new nations to institute dramatically new forms of judicial review, but its formative effect on legal thought and theory will be felt for quite some time. Finally, the common-law tradition will also be highly relevant. The common law is the dominant tradition in most of the former elements of the British Commonwealth (and therefore much of the world) and

offers a wide variety of experiences to those interested in the institution of judicial review. It is also the principal source of the attitudes and institutions that produced judicial review. While it is impossible to describe both briefly and adequately the character and nuances of these complex systems and the variations of them existing around the world, it is possible to provide a generalized examination of their broader features and the relationship of those features to judicial review.

### A. *The Civil-Law System*

The civil-law system is characteristic of the nations of the continent of Europe, including France, Germany, Italy, and others.<sup>4</sup> For the purposes of this Article, the most significant feature of civil-law jurisprudence is its traditional emphasis upon the limitation of the judicial function to the application of the policies enunciated by the principal lawmaking body, the legislature. This section provides an overview of the judicial function as it has developed in the classical civil-law tradition, investigates the historical antecedents of the civil-law attitude toward the judiciary in one nation, France, and sketches some of the general implications of the classical tradition for judicial review. It also discusses the post-World War II developments that have served to erode some of the important distinguishing features of the civil law's view of the judicial function.

#### 1. *The Limited Function of the Civil-Law Judge*

Traditionally, the civil law has prescribed an extremely limited role for judges in the processes of government. Philosophically, the civil law derived this position from principles of legislative supremacy and strict legal positivism. Instrumentally, the civil law limited the functions of the civil-law judge through the use of comprehensive codes of legal norms and the lack of a doctrine of precedent or *stare decisis*.

The foundational principle of the civil-law system has been the supremacy and sovereignty of the legislature, which traditionally has been considered to be the purest expression of the collective will. The peoples of the civil systems have typically placed an almost extravagant faith in their legislative

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<sup>4</sup> The civil-law system has also been adopted in most Latin American countries, chiefly through the influence of the colonial domination of Latin America by Continental powers. Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249, 251 (1986). For an introduction to the institution of judicial review in Latin America, see Keith S. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L.J. 785 (1974).

institutions.<sup>5</sup> Having passed through the fire of popular revolution against monarchical feudalism, the civil-law states were habituated to turning to their *Bundestags* and national assemblies, rather than to institutions like the judiciary, for the protection of basic rights. The relationship of the popular assemblies to the people was considered to be adequate protection against those bodies becoming sources of oppression.<sup>6</sup>

One consequence of legislative supremacy was a strict version of the appropriate separation of powers and a constrained view of the role of the judiciary in developing public policy. The legislature, being sovereign, enjoyed the exclusive prerogative for the enunciation of policy. The judiciary, in contrast, was merely an administrative tool for the application and implementation of the legislatively determined policies in the context of concrete cases.<sup>7</sup> The task of a judge in this system was not to "create" law in any sense, but rather only to determine the facts to which the laws were applicable.

On a theoretical level, the function of the judiciary dictated by this strict separation of powers was made possible by a widespread belief in a particularly strong version of legal positivism, the notion that positive law as laid down by a legislature could be neutrally applied by a judge without resort to the judge's own value judgments. Pursuant to this belief, judges could be considered merely legal experts rather than active participants in the process of governmental decisionmaking. In the words of one modern scholar, the ideal civil-law judge was a "skilled mechanic[] operating a syllogism machine."<sup>8</sup>

On a practical level, the civil-law judiciary was constrained in its activity by the use of comprehensive codes and by the absence of a system of precedent. Because virtually the entire corpus of the civil law was contained

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<sup>5</sup> Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 536 (1991) ("[T]he European parliamentary tradition places great faith and confidence in elected representative bodies. To Europeans, such caveats are comforting guarantees of the supremacy of parliament over the king and the king's judges.").

<sup>6</sup> See Jerome B. King, *Constitutionalism and the Judiciary in France*, 80 POL. SCI. Q. 62, 69 (1965) ("The constituents of the Revolutionary period apparently could not conceive of a government established on republican principles becoming oppressive.").

Similar jurisprudential strains of faith in the representative quality of legislatures also exist in common-law nations like the United States, though not to the point of actually repudiating the basic institution of judicial review. See, e.g., ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139-86 (1990).

<sup>7</sup> See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 34-38 (2d ed. 1985).

<sup>8</sup> Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 378 (1982).

within comprehensive codes,<sup>9</sup> the opportunities for civil-law judges to exercise independent law-creating authority were limited, even when such judges could overcome the influences of legal positivist ideals. The civil-law conception of the judge as a skilled mechanic was also furthered by the lack of precedent in the civil-law system. In the classic civil-law tradition, judicial decisions interpreting statutes were accorded no precedential weight in later cases involving the same statutes.<sup>10</sup> Because in theory there was no way in which a judicial interpretation could add anything to a statute, there was no need to refer to such interpretations in the process of deciding subsequent cases. In this way, the effect of whatever creativity a civil-law judge did exercise in applying a given code provision was stifled.

Overall, the classical civil-law judiciary was a relatively insignificant part of the governmental structure. Its limited role was defined by a stringent doctrine of the separation of powers, based on legislative supremacy, and a firm belief in the ideals of legal positivism. The existence of comprehensive codes covering the legal field and the lack of a tradition of precedent contributed to the narrow duties of the civil-law judge.

## 2. *Historical Antecedents: The Case of France*

It is useful in illustrating the character of the civil-law judge, and in setting the stage for a discussion of judicial review in the civil-law system, to discuss briefly the historical sources of the civil law's constrained view of the judicial function. The French experience is particularly instructive in this regard, both because the French antipathy to judicial law-making and hence to judicial review is so well-known<sup>11</sup> and because of the influence the French experience has had on other nations in the continental tradition.<sup>12</sup>

Perhaps ironically, the French attitude toward the judiciary was formed as a reaction to the excesses of a judiciary that vigorously exercised the power of

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<sup>9</sup> See MERRYMAN, *supra* note 7, at 28-33 (describing civil-law predilection for systematic and comprehensive legislation).

<sup>10</sup> *Id.* at 36; see Barker, *supra* note 4, at 255.

<sup>11</sup> See, e.g., James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, 192 ("[H]ostility to judicial review . . . marked French constitutional thought for nearly two centuries."); Rosenn, *supra* note 4, at 786 n.7.

<sup>12</sup> See Cappelletti, *supra* note 3, at 413 (antipathy toward judicial policymaking has been "a basic tenet of political and constitutional philosophy in France, and through French influence, in the rest of continental Europe, well into our century"); Antonio La Pergola & Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598, 617 (1985) ("The ideology of the French Revolution has led Italian legal thought to view government by judges as anathema.").

judicial review. During the pre-Revolutionary *Ancien Régime*, the high French feudal courts (or *Parlements*) actually asserted and implemented the authority to review legislation for conformity with what was called the "fundamental laws of the realm."<sup>13</sup> This power was employed not to leaven the arbitrary imposition of royal prerogative, but instead to impede the passage of those moderate reforms to which the monarch and his ministers had actually agreed.<sup>14</sup> Indeed, the power of the *Parlements* to review legislation was "considered to be one of the most outrageously conservative features of the country."<sup>15</sup>

Not only did the French judiciary employ its power of judicial review to prevent reform of the existing system, but the judiciary itself was one of the more abusive features of the *Ancien Régime*. By the time of the Revolution, most French judicial posts were owned by the nobility and bought and sold like other feudal properties.<sup>16</sup> There were no particular requirements for judicial office and no effective means of controlling the arbitrary exercise of judicial authority.<sup>17</sup> Judicial incompetence and corruption were the norm among the members of the *Parlements*; at the same time, these institutions were employing their authority of judicial review to prevent reform of the feudal system.

Not surprisingly, once the French revolutionaries had removed the monarchy and installed a (semi)popular government, they had no use for powerful and independent judges or for the institution of judicial review.<sup>18</sup> One of the first acts of the Revolutionary government was to abolish the *Parlements*.<sup>19</sup> In the place of the independently minded feudal judiciary, the

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<sup>13</sup> Rosenn, *supra* note 4, at 786 n.7; see MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 34 (1971). Technically, the power of the *Parlements* arose through their ability to refuse "registration" to royal legislation. If legislation was not "registered" by the *Parlements*, the theory went, it was not law. JOHN P. DAWSON, THE ORACLES OF THE LAW 364-66, 369-70 (1968).

<sup>14</sup> See DAWSON, *supra* note 13, at 369 ("By 1750, the *Parlements* had emerged as an articulate and determined opposition, resisting every effort at moderate reform that successive ministers sought to propose."); Cappelletti, *supra* note 3, at 412-13; see also CAPPELLETTI, *supra* note 13, at 35 ("[The judges of the French *Parlements*] were . . . among the bitterest enemies of even the slightest liberal reform. They were the fiercest opponents of the Revolution. . . ."); Rosenn, *supra* note 4, at 786 n.7.

<sup>15</sup> Cappelletti, *supra* note 3, at 412-13.

<sup>16</sup> DAWSON, *supra* note 13, at 355-56.

<sup>17</sup> See *id.* at 358-59.

<sup>18</sup> The revolutionaries also had little use for many of their former judges. Judges of the *Parlements* were among the first to be sent to the guillotine. See CAPPELLETTI, *supra* note 13, at 35.

<sup>19</sup> See DAWSON, *supra* note 13, at 370.



Revolutionaries established a court system in which judges were explicitly prohibited from exercising lawmaking functions or judicial review. Doubtful cases of statutory interpretation could not be decided by judges but had to be certified to the legislature for resolution.<sup>20</sup> The Revolutionaries had learned a powerful lesson at the feet of the *Parlements* and were determined not to allow a repetition of the experience.

This marked distrust of judges in France has continued almost up to the present day. For example, France's highest appellate court, the *Cour de Cassation*, was originally instituted to act as an agent of the legislature in enforcing the strict separation-of-powers principles that emerged from the Revolution. The court acted as an appellate court only in the limited context of guaranteeing that judges were not subverting legislative intent through judicial interpretation of statutes.<sup>21</sup> As discussed below in more detail, it has only been since World War II that the attitudes derived from the French experience with the *Parlements*, and exemplified by the *Cour de Cassation*, have begun to moderate with respect to the lawmaking authority of judges and hence to judicial review.<sup>22</sup>

### 3. Implications for Judicial Review

The limited civil-law conception of the judicial function, discussed above, has at least two implications for the general institution of judicial review.<sup>23</sup> To the extent that any of the new states of Central and Eastern Europe are influenced by the civil-law tradition, these consequences will be relevant to the development of the institution in those states. Furthermore, because many of the operational features of socialist legal systems and the civil law are quite similar,<sup>24</sup> the consequences of the civil-law legal-judicial tradition are suggestive of the effects of the socialist legal traditions.

First, legislatures and populations that are schooled in the civil-law tradition are more likely to exhibit a general hostility to the actual exercise of judicial review. Even if the institution of judicial review is endorsed by a civil-law nation in theory, the initial instances of its exercise with respect to a legislative enactment are likely to cause consternation, anger, and demands for

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<sup>20</sup> Neuborne, *supra* note 8, at 378 n.53.

<sup>21</sup> See DAWSON, *supra* note 13, at 378.

<sup>22</sup> See *infra* notes 35–39 and accompanying text.

<sup>23</sup> As discussed below, elements of the civil-law tradition have a number of further implications for choices regarding the particular form that judicial review is to take for a given nation. This section discusses only those implications that have general applicability and sets the stage for more specific inquiries later.

<sup>24</sup> See *infra* notes 47–51 and accompanying text.

repeal, because sizable constituencies will have been in favor of any given invalidated statute. Even in nations like the United States, with well-established traditions of judicial review, the actual invalidation of a statute by the judiciary in the name of the higher law of the Constitution is frequently an occasion for much displeasure directed at the offending court.<sup>25</sup> In nations lacking such a tradition, this understandable reaction may be exacerbated by the persistence of a belief that judges should not be engaged in lawmaking. Civil-law nations experimenting with judicial review will have to resist the temptation to remove the power of judicial review immediately once its puissance at thwarting the will of legislative majorities is effectively demonstrated.<sup>26</sup> One commentator has suggested that civil-law states can avoid this problem by providing for codification of judicial review, thereby rooting judicial review in the traditional forms of positive civil law.<sup>27</sup>

The recognition of the possibility of counter-reaction is perhaps one reason that courts exercising constitutional judicial review in civil-law countries have typically employed that authority in fairly modest terms. For example, in marked contrast to the United States, where stringent textualism is generally eschewed by the judiciary, the French body responsible for constitutional

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<sup>25</sup> The recent case of *Texas v. Johnson*, 491 U.S. 397 (1989), which invalidated a Texas law against flag-burning, is an excellent example. See, e.g., Associated Press, *Bush: Ban Flag-Burning, High Court Decision Attacked*, SAN JOSE MERCURY NEWS, June 27, 1989, at A1; Michael Tighe, *Vets, Republican Students Protest Supreme Court's Flag-Burning Decision*, FT. LAUDERDALE SUN SENTINEL, Sept. 10, 1989, at B4.

Along similar lines, it has been reported that dissatisfaction with the Supreme Court of Canada's abortion decisions have led to civil disobedience by the governmental institutions affected. See E.R. Alexander, *The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms*, 40 U. TORONTO L.J. 1, 37 (1990) (following the abortion decision, "Canadians were subjected to the unedifying spectacle of provincial governments engaging in a form of political nose-thumbing by openly defying the Supreme Court.").

<sup>26</sup> In India, for example, the supreme court's recognition of "unamendable" or "entrenched" property rights in the Indian Constitution precipitated a prolonged and bitter constitutional struggle between the court and the Indian legislature. In the course of this struggle, the legislature passed a constitutional amendment declaring that no constitutional rights in India were beyond amendment, thereby significantly reducing the judicial review authority of the Indian court. See INDIA CONST. art. 368 (1990), reprinted in INDIA, VIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 250 (1990); see generally, S.P. Sathe, *Judicial Review in India: Limits and Policy*, 35 OHIO ST. L.J. 870 (1974) (describing the conflict in India between supreme court and parliament). The supreme court, however, has reportedly invalidated portions of this amendment. See INDIA, *supra*, at 251 n.3 (citing *Minerva Mills Ltd. and Others v. Union of India and Others*, 2 S.C.C. 591 (1980)).

<sup>27</sup> See Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 840-43 (1991).

judicial review of statutes, the *Conseil constitutionnel*, "has tended to rely on textual sources of constitutional principles, demonstrating its interpretive restraint and thus solidifying its legitimacy as an organ of control."<sup>28</sup> A similar trend has been noted with respect to the German Constitutional Court.<sup>29</sup> Given the general distrust of judges in civil-law countries, this development is not at all surprising. The type of vigorous judicial review exhibited in nations like the United States is unlikely to develop quickly.

These observations apply with less force to judicial review of nonstatutory laws or regulations. When a court is merely reviewing an administrative decree for conformity with a statute or with a constitutional command, the affected political interests are likely to be less powerful than in the statutory context. Furthermore, the potential invalidation of an administrative action does not entrench upon the tradition of legislative supremacy associated with the civil system. Thus, it would not be surprising to see civil-law nations experimenting with administrative judicial review prior to adopting judicial review of statutes.

The second consequence of the civil-law tradition for judicial review involves the character of the judges themselves. Judges trained in the civil-law tradition may be ill-suited for the mantle of extraordinary authority that is a part of judicial review. In part because of the inevitable public displeasure, the exercise of judicial review requires a particularly hardy and independent judiciary.<sup>30</sup> "Judicial policy-making exposes judges to fierce public criticism by those who do not like the political consequences of their decisions and puts them right in the storm-centre of great partisan controversies . . . ."<sup>31</sup> The classical civil-law judge, however, has been trained to avoid political questions and to only "apply the law." Such instruction is poor training for the difficulties of judicial review. Moreover, the requirements for judicial positions in civil-law countries tend to be less demanding. Many civil-law judges are career judges who entered the judiciary immediately following their legal education and have not had the breadth of legal and practical experience often expected of judges who are to make constitutional decisions.<sup>32</sup> Therefore, even

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<sup>28</sup> Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265, 303 (1988).

<sup>29</sup> See Kommers, *supra* note 27, at 844.

<sup>30</sup> See Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 33 (1987) ("Judicial review presupposes a strong judiciary with the independence, prestige, and experience to perform the delicate balancing of individual and societal interests that goes into constitutional adjudication.").

<sup>31</sup> Edward McWhinney, *Constitutional Review in Canada and the Commonwealth Countries*, 35 OHIO ST. L.J. 900, 907 (1974).

<sup>32</sup> See Vroom, *supra* note 28, at 271 n.26 (quoting Mauro Cappelletti, *Nécessité et légitimité de la justice constitutionnelle*, in COURS CONSTITUTIONNELLES EUROPÉENNES ET

if a civil-law nation elects to adopt judicial review, its ability to do so may be constrained by a lack of judges with the training, experience, and bearing to adequately perform the task.<sup>33</sup>

#### 4. Recent Trends in the Civil Law

It is worth noting that the traditional civil-law conception of the judicial function has been breaking down in Europe at least since World War II. The two fundamental building blocks of that conception, legislative supremacy and legal positivism, have lost their philosophical and practical appeal and, consequently, the continental civil-law systems have been moving in the direction of a more expansive notion of judicial competence.

The Nazi and Fascist experiences in particular dealt crushing blows to the continental faith in the superiority of the legislature in protecting civil and political liberties. In place of that faith came an increased interest in the prospect of *judicial* protection of individual rights. Germany, for example, established a constitutional court with judicial review powers following the war in order to protect a number of human rights "entrenched" in the new German Constitution.<sup>34</sup> Even France, a hotbed of antipathy to judicial review, established a constitutional body, the *Conseil constitutionnel*, which has played an increasingly important role in controlling the constitutionality of legislation with respect to individual rights, albeit through specialized forms of review

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DROITS FONDAMENTAUX 463-64 (L. Favoreu ed. 1982)). See also MERRYMAN, *supra* note 7, at 35.

<sup>33</sup> The inadequate juristic training and resources of African lawyers, for example, have been blamed for the general failure of judicial review in many African nations following the wave of independence in the 1960s and 1970s. See James C.N. Paul, *Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa*, 35 OHIO ST. L.J. 851, 861-63 (1974). Similarly, it has been reported that early attempts to introduce judicial review in Germany in the 19th century were rejected by judges trained in the civil-law tradition. See Kommers, *supra* note 27, at 840 n.8.

<sup>34</sup> See Kommers, *supra* note 27, at 837-47, 852 (describing background of constitutionalism in Germany and the effect of Article 79 of the German Constitution, the so-called "eternity clause."). For an overview of the history and present practices of the German Constitutional Court, see Wolfgang Zeidler, *The Federal Constitutional Court of the Federal Republic of Germany: Decisions on the Constitutionality of Legal Norms*, 62 NOTRE DAME L. REV. 504 (1987).

rather than ordinary litigation.<sup>35</sup> Indeed, "the development of constitutional justice has become a hallmark of postwar European legal theory."<sup>36</sup>

The development of judicial review in the civil-law systems has been further assisted by the general demise of legal positivism. While legal positivistic ideals continue to exercise great pull at many levels, positivist theory has generally been discarded as a functional understanding of judging. As a matter of theory, the extraordinarily limited ideal of the "skilled mechanic" judge has thus been difficult to maintain with a corresponding increase in the possibility of judicial review.

As a practical matter, the adoption of judicial review by civil-law systems has been further facilitated by graduated introduction of the institution, typically through the "back door" of federalism and separation-of-powers review. Frequently, judicial review is instituted principally for the purpose of policing the separation of powers between the legislature and the executive, or the allocation of competencies between national and local authorities in a federal state. The *Conseil constitutionnel*, for example, was originally instituted primarily for these purposes.<sup>37</sup> Enforcement of federalism and separation-of-powers principles, however, accustoms responsible courts to the processes of judicial review. This familiarity then provides fertile soil for the development of other types of constitutional adjudication. It is often only a very small step between structural judicial review, like federalism, and the enforcement of constitutional individual rights. The *Conseil constitutionnel* took that step in 1971, announcing that henceforth the individual rights contained within the Declaration of the Rights of Man of 1789 would be protected and enforced.<sup>38</sup>

The continental experience of recent years thus suggests that the civil-law tradition is not completely at odds with judicial review. Despite legal-historical traditions that are hostile to its exercise, it appears that the civil-law system is itself not incompatible with judicial review. Instead, the question of whether a

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<sup>35</sup> See Vroom, *supra* note 28, at 266-67. Vroom's work provides a comprehensive overview of the performance and changing role of the *Conseil constitutionnel* in French law.

<sup>36</sup> *Id.* at 268.

<sup>37</sup> See *id.* at 273 ("Protection of individual rights was *not* within the original concept of constitutional control as instituted in 1958."); Neuborne, *supra* note 8, at 388 (Gaullists created the *Conseil constitutionnel* to "police the boundary between legislative and executive competence.").

<sup>38</sup> See Vroom, *supra* note 28, at 274-75. For a comparison of the U.S. Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), with the assertion of constitutional review by the *Conseil constitutionnel* in 1971, see George D. Haimbaugh, *Was It France's Marbury v. Madison?*, 35 OHIO ST. L.J. 910 (1974). Haimbaugh's answer to his titular query is a qualified yes. *Id.* at 926.

particular civil system may permit the introduction of judicial review may depend on the extent to which the historical conception of the limited judiciary still flourishes in that particular nation.<sup>39</sup>

### B. *Socialist Legal Systems and Theory*

Socialist (or communist) legal traditions, both in practice and in theory, are relevant to the new nations of Central and Eastern Europe in two ways. First, many of the jurists who will form the backbone of the new judiciary in these nations will have been trained under the old socialist systems.<sup>40</sup> These jurists will necessarily exhibit certain strengths and weaknesses associated with this training that must be considered when the tasks of the new judiciaries are determined. If the legal system is asked to perform tasks of which it is not capable, the project of democratic government itself will be set back. Second, despite the discontinuity perceived in the West between the old Communist order and the new "democratic" character of the emerging nations, the socialist legal order is still the background, the milieu, in which the new systems will be created.<sup>41</sup> The activities of the new Constitutional Court of Russia, for

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<sup>39</sup> The trend of movement in the civil law toward an increased role for the judiciary in the enforcement of constitutional norms has also been apparent in the Latin American countries. There, the combined influence of the civil-law traditions of the dominant colonial powers and the common-law traditions of the nearby United States created fertile ground for a mixed system of judicial action, "reflecting the persistence of the United States model, the difficulties of implementing such a model in civil-law countries, and the special difficulties of launching constitutionalism in the Latin American *ambiente*." Rosenn, *supra* note 4, at 788.

<sup>40</sup> The necessity of retaining the "experienced staff" of the Soviet judiciary was recognized in a Working Paper that was presented to the Russian Parliament in October 1991. Boris Zolotukhin, *Working Paper on Legal Reform in the Russian Federation*, NEW OUTLOOK, Winter/Spring 1992, at 75, 83 (English summary by Janine Ludlam).

<sup>41</sup> The residual force of the old Communist order can be seen in President Boris Yeltsin's recent difficulties with the Russian Congress of People's Deputies in maintaining the pace of his economic reforms. See, e.g., Serge Schmemann, *Russian Legislators Reject Yeltsin's Choice for Premier*, N.Y. TIMES, Dec. 10, 1992, at A19; Serge Schmemann, *Yeltsin Abandons His Principal Aide to Placate Rivals*, N.Y. TIMES, Dec. 15, 1992, at A1. The deputies of this Russian Congress were elected prior to the demise of the Soviet Union. See Celestine Bohlen, *Yeltsin is Back in Russia to Join in a New Battle*, N.Y. TIMES, Dec. 20, 1992, at A12; Steven Erlanger, *Yeltsin Expects Cabinet to Keep Reformist Aides*, N.Y. TIMES, Dec. 21, 1992, at A4 (West Coast ed.). These difficulties culminated in a bloody showdown after President Yeltsin dissolved the Russian parliament and his opposition barricaded themselves in the parliament building, known as the White House. After a 13-day standoff, troops loyal to president Yeltsin ousted the opposition legislators and their

example, are still based on a constitution that, although amended numerous times in the past two years, was originally adopted in 1978.<sup>42</sup>

In terms of its conception of the judiciary, the socialist legal tradition arrived at a conclusion very similar to that exhibited by the continental civil-law systems, but through entirely different reasoning. Like the Continental civil-law tradition, socialist legal theory adhered to notions of legislative supremacy that afforded no space for judicial review. Unlike the Continental systems, whose tenets of legislative supremacy were by and large historically determined, the socialist legal system derived its conclusions from the theoretical underpinnings of socialism. According to traditional socialist theory, the state was the expression of the dictatorship of the proletariat.<sup>43</sup> Because the proletariat could hardly act contrary to its own interests, there was no need for any division of powers,<sup>44</sup> nor for judicial review of any sort.

It is interesting to note that apparent concern with the potentially reactionary character of the judiciary played some role in justifying the wisdom of the rule dictated by theory. Many socialist legal thinkers labeled judicial review a "reactionary bourgeois institution" whose purpose was to maintain the

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supporters from the building. See, e.g., Serge Schmemmann, *Showdown in Moscow: Yeltsin and Legislature Act to Oust Each Other; Clinton Backs President*, N.Y. TIMES, Sept. 22, 1993, at A1; Celestine Bohlen, *Showdown in Moscow: At the Russian Parliament, Waiting and Confusion*, N.Y. TIMES, Sept. 23, 1993, at A12; Serge Schmemmann, *Yeltsin Tightening Cordon of Troops At the Parliament*, N.Y. TIMES, Sept. 29, 1993, at A1; Serge Shmemann, *Official Warning by Yeltsin Fails to Dislodge Legislators*, N.Y. TIMES, Sept. 30, 1993, at A14; Serge Schmemmann, *Showdown In Moscow: Yeltsin Sends Troops to Oust Armed Foes From Parliament; Fierce Battle Rages in Capital*, N.Y. TIMES, Oct. 4, 1993, at A1; Serge Schmemmann, *Showdown in Moscow: Russian Army Routs Rebels At Parliament As Yeltsin Takes Steps to Tighten Control*, N.Y. TIMES, Oct. 5, 1993, at A1.

<sup>42</sup> See, e.g., LAW OF THE RUSSIAN FEDERATION ON CHANGES AND ADDITIONS TO THE CONSTITUTION (BASIC LAW) OF THE FEDERATION (1992), reprinted in THE RUSSIAN FEDERATION, XV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 85 (1993).

<sup>43</sup> Vladimir Gsovski, *The Soviet Union, in GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE* 33 (Vladimir Gsovski ed. 1959). See Rhett Ludwikowski, *Judicial Review in the Socialist Legal System: Current Developments*, 37 INT'L & COMP. L.Q. 89, 89 (1988) ("Socialist law theorists traditionally argued that 'the legislature is conceived to be the supreme expression of the will of the people and beyond the reach of judicial restraint.'" (quoting J.N. HAZARD ET AL., THE SOVIET LEGAL SYSTEM: THE LAW IN THE 1980s 320 (1984))).

<sup>44</sup> See RUDOLF SCHLESINGER, SOVIET LEGAL THEORY 119 (1945) (division of powers generally rejected in Soviet ideology); Hartwig, *supra* note 2, at 450 ("[T]he result of the socialist theory [is] that all power is concentrated in the soviets, the councils, or parliamentary organs. The idea of checks and balances between and among the organs does not fit within that theory.").

economic exploitation of the working classes. As Andrei Vyshinsky wrote early in the development of socialist legal theory:

Every sort of statute (in bourgeois countries) is considered as having force until it occurs to some private person or capitalist enterprise to file a petition to have it, or a separate paragraph of it, declared unconstitutional. Naturally this right is broadly used by monopolist cliques of exploiters to obtain a declaration of "unconstitutionality" as to laws running counter to their interests.<sup>45</sup>

Of course, the conclusions of socialist legal theory in this regard dovetailed nicely with the pretension of the Communist Party to absolute dominion in each of the Central and Eastern European socialist states. It is at least questionable as to whether the Party in those states would have permitted any sort of judicial review even if socialist legal theory could have accommodated such a thing. Although certain Communist states did experiment with limited forms of judicial review,<sup>46</sup> it seems highly unlikely that any serious review could have flourished under Communist rule. From this perspective, the details of socialist legal theory may be less important to the development of judicial review in former Communist nations than the simple observation that such review did not exist and would have been rejected if proposed.

Because the effective implementation of socialist legal theories was essentially identical to those of the continental civil-law systems, the implications for judicial review are roughly the same. The people and legislatures of the new nations may be poorly prepared for the experience of judicial invalidation of otherwise legitimate legislative or executive enactments. This lack of preparation has already been demonstrated. For example, the Chairman of the Russian Constitutional Court, Valery Zorkin, was early on forced to explain to President Boris Yeltsin, at some length, that the Court's invalidation of an executive decree was actually binding upon Yeltsin's government.<sup>47</sup>

Similarly, the judges and lawyers of these nations are typically not well-trained or well-prepared for the independence required for the exercise of judicial review.<sup>48</sup> The socialist legal system rarely rewarded jurists for

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<sup>45</sup> Ludwikowski, *supra* note 43, at 91 (quoting ANDREI VYSHINSKY, *THE LAW OF THE SOVIET STATE* 339-40 (1948)).

<sup>46</sup> See *infra* notes 52-56 and accompanying text.

<sup>47</sup> Dmitri Kazutin, *What I Have Read, Heard or Seen*, MOSCOW NEWS WEEKLY, no. 4, 1992, at 3. According to the report, Yeltsin was "sincerely puzzled" by the notion that there was an authority which could be higher than his own. *Id.*

<sup>48</sup> As one *Izvestia* columnist is reported to have said, "the Soviet Union does not have a judicial branch. Our courts are afraid to use their power because they are too accustomed to being a repressive agent of the command-administrative apparatus." See Alexander



independent thought and ability, and jurists trained in that system should not be expected to develop such skills overnight.<sup>49</sup> Furthermore, the lack of a legal and political culture in which judicial independence is prized is still evident. Recently, for example, Chairman Zorkin has attempted to act as a political mediator between Yeltsin and the Russian Congress of People's Deputies.<sup>50</sup> In the eyes of some critics, Zorkin's actions have undermined the legitimacy of the Court,<sup>51</sup> even though the political instability in Russia may have left the Chairman with little choice. Thus, even when former socialist nations may be able to find qualified independent jurists, the legal and political culture of those nations may not contribute to the development of judicial institutions capable of exercising judicial review in the traditional sense.

These observations should be moderated somewhat by the knowledge that the stringency of socialist thought regarding judicial review began to erode at some time prior to the actual demise of the Soviet Union. Yugoslavia, for

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Mishkin, *The Russian Legal System as of August 1991: End of the Soviet System and Beginning of a Russian Democratic System* (1991) (excerpt on file with the *Ohio State Law Journal*).

<sup>49</sup> Current efforts are being made to overcome this lack of training and experience through judicial training academies exposing judges to Western judicial thought and techniques.

<sup>50</sup> In December 1992, Zorkin brokered a truce between Yeltsin and Ruslan Khasbulatov, the Speaker of the Russian Congress, which involved a national referendum to be held on April 11. See Serge Schmemmann, *The Fight to Lead Russia*, N.Y. TIMES, Mar. 13, 1993, at A1; Celestine Bohlen, *Yeltsin, Defying Congress, Says the Referendum is On*, N.Y. TIMES, Mar. 13, 1993, at A1 (West Coast ed.). Since then, Zorkin has become one of the key players in the ongoing political disputes between Yeltsin and the Congress. See, e.g., Serge Schmemmann, *Yeltsin and Rivals Are in a Standoff in Power Struggle*, N.Y. TIMES, Mar. 24, 1993, at A1 (reporting alliance of Zorkin with Khasbulatov to head off Yeltsin's attempts to impose "special rule").

Zorkin and the Russian Constitutional Court have also been casualties of Russia's recent upheavals. Following Yeltsin's successful siege of the Russian parliament building, the court was dissolved by presidential decree pending adoption of a new constitution. See Celestine Bohlen, *Russia In Mourning For Moscow Dead*, N.Y. TIMES, Oct. 8, 1993, at A11.

<sup>51</sup> Zorkin's habit of announcing Constitutional Court decisions prior to the Court's hearings has engendered particular criticism and has been blamed for contributing to the political crisis. According to Constitutional Court Justice Ernst Ametistov, "[o]ur court played a fateful role in the nightmare now shaping . . . The more I look at it, the more violations I find. That he [Zorkin] sat in judgment after he already declared his point of view, in the parliament and on television, is absolutely forbidden." Serge Schmemmann, *Compromise or No, Rivals of Yeltsin Still Seek Ouster*, N.Y. TIMES, Mar. 25, 1993, at A1, A14.

example, established a federal constitutional court as early as 1963,<sup>52</sup> although this institution unfortunately had lost a substantial amount of its authority to review laws for constitutionality by the mid-1980s.<sup>53</sup> In the 1960s, some Polish legal thinkers began to investigate tentatively the idea that judicial control of constitutionality might be appropriate.<sup>54</sup> In 1986, this investigation bore fruit, and the Poles established a constitutional tribunal with authority to review a number of legal acts for conformity with the constitution.<sup>55</sup> As with the civil-law tradition, therefore, the socialist legal tradition does not itself appear to be entirely preclusive of judicial review.<sup>56</sup>

### C. *The Common-Law Tradition*

The influence of the common-law tradition upon the new nations of Central and Eastern Europe will be less direct than that of the civil-law and socialist legal-judicial traditions. Still, the prevalence of the common-law system and its close relationship to judicial review indicates its potential relevance to the new states of Central and Eastern Europe. While the debate has raged as to whether judicial review is a uniquely "American" invention, there is no doubt that the common-law experience has provided a model for many of the examples of judicial review we see around the world today. The common law certainly provides one strand of legal thought that is likely to have an important influence upon the choices facing the new nations of Central and Eastern Europe as they develop their judicial systems.

The common-law view of the judicial function is substantially at variance with that of the civil-law and socialist legal systems. Traditionally, the common law has placed much more faith in judges and hence has been more receptive to the participation of judges in the policymaking process of governing. This greater degree of faith can be traced to two interrelated phenomena of the common-law system. First, in administering the common law, judges are

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<sup>52</sup> See Ludwikowski, *supra* note 43, at 94.

<sup>53</sup> See Hartwig, *supra* note 2, at 451-52.

<sup>54</sup> Ludwikowski, *supra* note 43, at 99.

<sup>55</sup> *Id.* at 100-01.

<sup>56</sup> The Soviet Union even experimented briefly with a form of constitutional control just prior to its disintegration. In 1989, the Congress of People's Deputies established a legislative body known as the Constitutional Oversight Committee, which actually invalidated a number of laws and decrees as unconstitutional in its brief period of existence. For an overview of the activities of the Constitutional Oversight Committee, see Alexander Mishkin, *The Emergence of Constitutional Law in the Soviet Union*, NEW OUTLOOK, Spring 1991, at 7; Peter B. Maggs, *Enforcing the Bill of Rights in the Twilight of the Soviet Union*, 1991 U. ILL. L. REV. 1049.

specifically empowered to make law in those instances in which a statute or constitutional directive does not control. Thus, the judges of common-law countries are more accustomed to the task of judicial policymaking, and the peoples and legislatures of those countries are similarly accustomed to accepting such policymaking as legitimate. Second, chiefly through their experience with the Privy Council of the old British Empire, most of the common-law countries are more deeply steeped in a legal culture that recognizes the principle of legal hierarchy, a principle at the heart of the institution of judicial review.

### 1. *The Anomaly of Great Britain*

In discussing judicial review in common-law countries, however, one notices immediately the anomaly that the mother country of the common law, Great Britain, does not now and never has had any form of judicial review.<sup>57</sup> In fact, the British have maintained a system of exclusive parliamentary supremacy that has outlasted even the hardest of the civil-law systems on the continent. While the British experience in this respect is important, it is of limited significance.

One reason for the absence of constitutional judicial review in British law has been the lack of any viable source of identifiable constitutional commands that could be enforced through judicial review. The British have maintained a constitution that is the accumulation of existing political practices, including ordinary statutes, rather than a set of unalterable legal imperatives. According to A.V. Dicey, the pre-eminent 19th century scholar of British constitutional law: "There is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional."<sup>58</sup> Because there was no constitutional "higher law" in Great Britain, there was nothing upon which to base judicial review.<sup>59</sup>

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<sup>57</sup> See S.H. BAILEY & M.J. GUNN, SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM 242 (2d ed. 1991). In Great Britain, the very term "judicial review" means simply appellate review of the decisions of lower courts.

<sup>58</sup> A.V. DICEY, LAW OF THE CONSTITUTION 89 (9th ed. 1948).

<sup>59</sup> Natural law, the most appealing alternative to positive constitutional law, enjoyed a brief popularity in medieval legal theories and could have been employed by English judges to strike down statutes, but it was eschewed early on in the common-law tradition. See HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1265 (1953) ("Abandoning the medieval idea that there was a fundamental and immutable natural law, the common law recognized the legislative supremacy of Parliament.").

The origins of parliamentary supremacy in Great Britain can be located, as can the same theories in France, in the struggles of the populace against the monarchy. The parliamentary successes of the Glorious Revolution of 1688 instilled in the British legal and political mind the absolute supremacy of Parliament.<sup>60</sup> Centuries later, parliamentary sovereignty is still a canonical belief in the British legal system.<sup>61</sup> There are periodically attempts to institute some form of constitutional judicial review in Great Britain,<sup>62</sup> but as of yet these attempts have come to nothing.

The British experience is interesting but should not be overemphasized. In the United States, we are often quick to assume that the adequate protection of civil and political rights necessarily involves the enforcement of constitutional guarantees by courts. The relative success of the British system, at least in Britain itself, illustrates that nations without judicial review can enjoy significant individual freedoms and rights. We should not make the converse error, however, and conclude that the British success can be easily replicated elsewhere. Great Britain seems to have succeeded in protecting civil and political rights in a legislatively dominated system only by coupling parliamentary supremacy with a strong "rule of law" tradition. Shorn of such a tradition, legislative supremacy can be an extremely dangerous doctrine. The recent situation in South Africa, one of the few Commonwealth nations without judicial review, for example, has been explained as a consequence of the British tradition of parliamentary supremacy without a concomitant tradition of solicitude for individual political and civil rights.<sup>63</sup>

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<sup>60</sup> See EDWARD MCWHINNEY, JUDICIAL REVIEW 32 (2d ed. 1969) ("[T]he sovereignty of Parliament [was] . . . a product of the successful assertion of the political supremacy of the legislative arm of English government in the great constitutional struggles of the seventeenth century."); F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 284-85 (1st ed. 1908) (discussing how Glorious Revolution settled contest between king and Parliament for sovereignty).

<sup>61</sup> Descriptions of this sovereignty ascribe to it a power second only to that of the deity. In Blackstone's words, "[Parliament] can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo." See J.W. EHRLICH, EHRLICH'S BLACKSTONE 55 (1959).

<sup>62</sup> These proposals have been made seriously by significant British legal figures. Lord Leslie Scarman, a Judge of the British High Court of Justice, proposed a Supreme Court of the United Kingdom with the "power to declare invalid and to quash legislation as unconstitutional." LORD LESLIE SCARMAN, ENGLISH LAW—THE NEW DIMENSION 81-83 (1974).

<sup>63</sup> See, e.g., Charles Villa-Vicencio, Essay, *Whither South Africa?: Constitutionalism and Law-Making*, 40 EMORY L.J. 141, 145-48 (1991); J.D. van der Vyver, *Depriving*

## 2. *Judicial Review Elsewhere in the Common-Law World: The Theory of the Hierarchy of Laws*

As suggested above, the British rejection of judicial review is not reflective of the general pattern in the rest of the common-law world. Most of the common-law nations, such as the United States, Canada,<sup>64</sup> India,<sup>65</sup> and Australia,<sup>66</sup> have some form of judicial review. In large part, the common-law acceptance of judicial review is closely associated with its general familiarity with the policymaking authority of judges through the ordinary processes of the common law.

However, another portion of this acceptance derives from prevalence of "higher law" theories in the common-law world. The impact of these higher law theories can particularly be seen in the United States, where the institution of judicial review was explicitly based upon theories regarding the hierarchy of various sorts of laws. In *Marbury v. Madison*,<sup>67</sup> Chief Justice John Marshall argued that judicial review of statutes for conformity with the Constitution was required because the Constitution is a higher form of law. Because the courts must decide cases in accordance with the law, courts are obligated to determine whether a given legislative enactment conflicts with the constitutional directive.<sup>68</sup> When the statute (the lower form of law) conflicts with the Constitution (the higher form of law), the latter is given controlling effect by the courts.<sup>69</sup>

Hierarchical legal theories were fostered in the other common-law nations of the former British Empire by the very structure of colonial government. While the constituent parts of the Commonwealth were permitted to govern

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*Westminster of Its Moral Constraints: A Survey of Constitutional Development in South Africa*, 20 HARV. C.R.-C.L. L. REV. 291, 306-07 (1985).

<sup>64</sup> See *Reference re Section 94(2) of the Motor Vehicle Act*, 24 D.L.R.4th 536, 544-47 (1986) (discussing traditional federalism judicial review in Canada as well as relatively novel human rights judicial review under the Canadian Charter of Rights and Freedoms).

<sup>65</sup> See INDIA CONST. art. 132 (1990), reprinted in INDIA, *supra* note 26, at 105 (establishing appellate jurisdiction of Supreme Court in cases involving constitutional questions); see also Sathé, *supra* note 26, at 870-71.

<sup>66</sup> The Australian Constitution has no explicit provision for the judicial review of statutes, yet that authority is exercised by Australian courts. See, e.g., *Australian Communist Party v. Commonwealth*, 83 C.L.R. 2 (Austl. 1950) (invalidating portions of legislation directed at making the Communist Party illegal as beyond the Australian legislature's constitutional authority).

<sup>67</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>68</sup> *Id.* at 177-78.

<sup>69</sup> *Id.* at 180.

themselves for the most part, their domestic legislation was reviewable by the Judicial Committee of the Privy Council for conformity with the laws of Great Britain, particularly those pertaining to colonial government.<sup>70</sup> Through this process, the elements of the British colonial empire became accustomed to the notion that even valid legislation could be invalidated for conflict with higher legal norms.<sup>71</sup> Constitutional judicial review differed from Privy Council review only in that the source of the former was local positive law rather than externally imposed law.

One of the most interesting features of Privy Council review was its demand that the legislation of the colonies not be "repugnant" to the British set of constitutional statutes.<sup>72</sup> This term, "repugnant," was the same term employed by Marshall in *Marbury* to describe the relationship of unconstitutional legislation to the U.S. Constitution.<sup>73</sup> It was also the same term used by Coke in his famous dictum in *Dr. Bonham's Case* in suggesting that British legislation could be invalidated for conflict with the common law.<sup>74</sup>

Thus, while the specific source of the application of higher law theories in the common-law tradition has ranged from the logical syllogisms of *Marbury* to the historical practices of the Privy Council,<sup>75</sup> there appears to be an essential

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<sup>70</sup> See MCWHINNEY, *supra* note 60, at 56-60. Some 25 Commonwealth nations still retain appellate review by the Privy Council. BAILEY & GUNN, *supra* note 57, at 95. See also J.W. Harris, *The Privy Council and the Common Law*, 106 LAW. Q. REV. 574 (1990) (discussing common-law consequences of appellate review by Privy Council of different jurisdictions within the Commonwealth).

<sup>71</sup> MCWHINNEY, *supra* note 60, at 13 ("The historical origins of direct judicial review in the Commonwealth countries seem to reduce to the fact that the Privy council originally exercised that power in relation to the overseas Empire."); Alexander, *supra* note 25, at 2 (noting effect of Privy Council review on acceptability of judicial review in Canada).

<sup>72</sup> See MCWHINNEY, *supra* note 60, at 58 ("It is the general condition of all legislation by subordinate and provincial assemblies, throughout the British Empire, that the same 'shall not be repugnant to the law of England'." (quoting ALPHEUS TODD, *PARLIAMENTARY GOVERNMENT IN THE BRITISH COLONIES* (1880))).

<sup>73</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 177, 180 (1803). The terminology was also adopted in *The Federalist Papers* to describe the inconsistency of statutes with the U.S. Constitution. THE FEDERALIST PAPERS No. 78, at 230 (Alexander Hamilton) (Fairfield 2d ed. 1966).

<sup>74</sup> 8 Co. 118a (Eng. 1610) (quoted in Edwin Corwin, *The "Higher Law" Background of American Constitutional Law, Part II*, 42 HARV. L. REV. 365, 368 (1928)).

<sup>75</sup> Other "common-law" nations that adopted constitutions with human rights and provisions for judicial review frequently did so as part of the conditions by which they were granted independence from colonial rule. Robert B. Seidman, *Judicial Review and Fundamental Freedoms in Anglophonic Independent Africa*, 35 OHIO ST. L.J. 820, 820-21 (1974); Paul, *supra* note 33, at 855.

continuity in the amenability of common-law adjudication to judicial review. The source of this continuity is most likely the role of the common-law judge in policymaking. The common law's frank recognition of the policy-making role of judges provided a framework both for the existence of multiple forms of positive law (statutory and common law) as well as for the direct involvement of judges in lawmaking. When judges are openly allowed the authority to participate creatively in the processes of government, the stage is set for the introduction of judicial review.

### *3. Recent Trends in the Common Law*

At the same time the civil-law systems have been moving toward forms of constitutional control of legislation, the common-law nations have been moving toward more extensively codified legal systems. In these ways, the two legal systems are beginning to converge. The traditional authority and independence of the common-law judge has been reduced in recent years by the introduction of broad and comprehensive legislation in those nations that adhere to the common-law system.<sup>76</sup> The common-law judge is now called upon to exercise his or her authority more and more often in cases of statutory construction and less frequently in cases of explicit judicial lawmaking. This shift in focus is likely to be accompanied by an increasing judicial deference to the legislature and diminution of the ability of the common-law judge to interpose his or her authority against the will of the majority.<sup>77</sup>

#### *D. Summary*

The civil-law tradition, in its classical form, severely restricted the ambit of judges in deciding cases by relying heavily on principles of legislative supremacy and legal positivism. In practice, the civil-law code system and the rejection of precedent further limited judicial scope. While the modern civil

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<sup>76</sup> For a description of this proliferation of legislation, see generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). See also LORD LESLIE SCARMAN, *LAW REFORM* 47 (1968) (By 1967, "the bulk of the English law that matters ha[d] found its way into the statute book.").

<sup>77</sup> Conservative jurists point out, however, that American judges have been able to maintain a modicum of operational independence even in the face of extensive statutory development through the "freewheeling interpret[ation]" of statutes and the use of "conveniently vague constitutional doctrines." See, e.g., RICHARD POSNER, *SEX AND REASON* 79-81 (1992) (noting the role of courts in moderating the effect of Victorian morals legislation in America). To the extent that this is the case, the disempowerment of the common-law judge by extensive legislative activity will be diluted.

systems have been moving away from absolutism in these areas, this history suggests limitations on the political capacity of civil-law nations to stomach judicial interference, as well as to produce judges capable of exercising judicial review. To the extent the new nations of Central and Eastern Europe draw from the civil-law tradition, they will likely encounter similar difficulties.<sup>78</sup>

Socialist legal tradition, which derived its conclusions theoretically rather than historically, imposed restrictions on judicial behavior similar to those associated with the civil-law principles of legislative supremacy. Countries that were formerly socialist may therefore expect to have similar problems with judicial review, even if they eschew relying upon the civil experience. Unfortunately, the lack of a rule-of-law culture and a cadre of independent-minded judges may limit the range of choices available to these countries in developing forms of judicial review.

The common law, by way of contrast, is relevant to the new states of Central and Eastern Europe as an intellectual force rather than as a direct constraint or influence, and it will prove to be more a source of comparative analysis than an immediate cultural antecedent. The common law offers the new states a jurisprudence richer in judicial independence and legal hierarchical theory, which is at the core of effective judicial review, than do the civil or socialist legal-judicial traditions.

### III. THE FORMS AND STRUCTURES OF JUDICIAL REVIEW

Once the determination to institute some form of judicial review has been made, a number of secondary choices regarding the forms and structures of that review will necessarily present themselves.<sup>79</sup> Of course, none of these choices can be made independently. The choice of the courts to which competence to exercise judicial review will be granted is perforce closely related to the choice

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<sup>78</sup> One commentator has already noted the influence of the civil-law traditions in at least one former socialist country, Hungary. See Ethan Klingsberg, *Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights*, 1992 B.Y.U. L. REV. 41, 121 n.197. Klingsberg, in particular, notes the importance of a lack of precedent in Hungary's civil-law practice and the presence of strong legal positivism. *Id.* at 121-25.

<sup>79</sup> The classic study of comparative judicial review, though now a little dated, is MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971). For a more recent study, see ALLEN R. BREWER-CARIAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* (1989). This Article relies in large part upon Cappelletti's work for the categorization of the various types of judicial review. It recognizes, however, that these categories imperfectly capture the tremendous variety of forms of judicial review and are therefore merely a starting point for investigation rather than a strictly limited menu of options.



of the scope of the review power, and vice versa. Any attempt to distinguish the choices analytically therefore runs the risk of appearing to limit the available options to a series of binary decisions regarding each of the various characteristics of judicial review. We have no interest in attempting to reduce the richness of the options that are available to new nations (or old nations, for that matter) in experimenting with the multitude of means by which judicial review can be implemented. Instead, the purpose in providing analytic distinctions between the various aspects of judicial review is to establish a structure for discussion. Some of the implications for other choices will be sketched out, but due to the fullness of the subject, there is no claim to comprehensiveness.

#### A. *The System of Judicial Review: Centralized or Diffuse?*

##### 1. *Centralized and Diffuse Systems of Judicial Review*

The first and most important decision regarding the exercise of judicial review involves the judicial structure that will have the review authority. In this respect, traditional scholarship has typically distinguished between two basic models of court structure, which have been loosely labeled the American and Austrian systems.<sup>80</sup> While the distinction between the two systems has begun to break down, they still represent fundamentally different approaches to the problems of implementing judicial review.

The American, or "diffuse," system of judicial review relies upon the constituent pieces of the ordinary judicial system to engage in judicial review. In the United States, any lower court may make a decision regarding the constitutionality of both legislation and administrative action, or the conformity of a lower law to a statutory mandate. That decision is binding upon the parties involved until reversed by a higher court. The American system, therefore, allows a high degree of judicial control of constitutionality because judicial resources are utilized to their maximum capacity.<sup>81</sup> The American system is particularly popular in the common-law countries of the British

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<sup>80</sup> CAPPELLETTI, *supra* note 79, at 46-51; *see* BREWER-CARIAS, *supra* note 79, at 177-81.

<sup>81</sup> The diffusion of judicial review authority in the United States is multiplied by the presence of two judicial systems, state and federal, both of which have equal authority to invalidate legislative and executive actions for incompatibility with constitutional norms.

Commonwealth, including Canada, India, and Australia.<sup>82</sup> It has also made inroads in Latin American countries influenced by the U.S. model.<sup>83</sup>

The Austrian, or "centralized," system of judicial review, on the other hand, relies upon a specialized court system, frequently a single constitutional court, to exercise judicial review. The original model for the system was the Austrian Constitution of 1920.<sup>84</sup> Under the Austrian system, the general courts are barred from making constitutional determinations, although they may be allowed the authority to "certify" such questions to the constitutional court when those questions arise in the course of ordinary litigation.<sup>85</sup>

The distinction between the two systems has been decreasing somewhat in recent years. In the United States, for example, the use of the writ of certiorari has transformed the Supreme Court into an institution whose function is almost exclusively constitutional.<sup>86</sup> The lower courts, however, still maintain the traditional combination of the decision of constitutional and non-constitutional issues.<sup>87</sup>

The features of the three legal-judicial traditions discussed above are directly relevant to the choice of a centralized or a diffuse system of judicial review. The Austrian model has typically been the preferred choice of the civil-law nations. Cappelletti has assigned three reasons for this preference, each of which relates to characteristic features of the civil-law system.<sup>88</sup> First, the civil law's tradition of legislative supremacy is partially appeased by the restriction of judicial review to a single specialized tribunal.<sup>89</sup> Second, because the civil-law nations generally reject the notion of precedent, a diffuse system of judicial review poses the specter of radically inconsistent decisions being rendered on

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<sup>82</sup> See CAPPELLETTI, *supra* note 79, at 47.

<sup>83</sup> Argentina, Brazil, El Salvador, Venezuela, and Mexico all have had forms of the American diffuse system of judicial review. Rosenn, *supra* note 4, at 788.

<sup>84</sup> CAPPELLETTI, *supra* note 79, at 46.

<sup>85</sup> See, e.g., F.R.G. CONST. art. 100 (1949) (describing certification procedure to German Constitutional Court), reprinted in FEDERAL REPUBLIC OF GERMANY, VI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 131 (1991); Pergola & Del Duca, *supra* note 12, at 603-04 (describing certification procedure to the Italian Constitutional Court).

<sup>86</sup> See MCWHINNEY, *supra* note 60, at 235 ("[F]or all practical purposes since the reforms effected by the Judiciary Act of 1925, the United States Supreme Court has become a specialist public law or constitutional tribunal."); CAPPELLETTI, *supra* note 79, at 67.

<sup>87</sup> See, e.g., State v. A, B, C, D & E, 847 P.2d 455 (Wash. 1993) (en banc) (state court deciding both state statutory issue and federal constitutional issue as to mandatory HIV testing of juvenile sex offenders).

<sup>88</sup> See CAPPELLETTI, *supra* note 79, at 53-66.

<sup>89</sup> *Id.* at 54-64.

identical constitutional issues.<sup>90</sup> Finally, the legal-judicial culture in which civil-law judges operate limits the number of judges available who can effectively exercise judicial review.<sup>91</sup>

## 2. *Constitutional Human Rights in Central and Eastern Europe: The Dilemma of Ambition and Inadequate Resources*

To date, the Austrian model has also been the most popular choice of the new nations of Central and Eastern Europe. Poland<sup>92</sup> and Hungary,<sup>93</sup> for example, have already established single constitutional courts based on the Austrian model. Russia's constitutional court has achieved prominence in its short existence.<sup>94</sup> Variations on the Austrian model are also being considered in Romania,<sup>95</sup> Azerbaijan,<sup>96</sup> and Ukraine.<sup>97</sup> The preference of the new states for the Austrian model is not surprising, given the influence of the civil-law system and the similar effects of the civil tradition and socialist legal theory.<sup>98</sup>

At least one nation in Eastern Europe, Latvia, is considering the adoption of a constitutional system that shares the American feature of vesting ultimate responsibility for constitutional issues in a supreme court rather than in a

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<sup>90</sup> *Id.* While such inconsistencies are possible under the American system, the availability of precedential decisions by appellate courts eliminates the danger in its most serious instances. When inconsistencies exist in the American system between the lower courts and eventually reach a certain level of importance, a higher court will typically assume jurisdiction and provide an authoritative resolution. *Id.*

<sup>91</sup> *Id.* at 60.

<sup>92</sup> POL. CONST. art. 33a (1991), reprinted in POLAND, XV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 17 (1991).

<sup>93</sup> HUNG. CONST. ch. IV, § 32/A (1949), reprinted in THE REPUBLIC OF HUNGARY, VIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 13 (1990).

<sup>94</sup> The Russian Constitutional Court came into existence on July 12, 1991, when the Congress of People's Deputies adopted the Law on the Constitutional Court. For a detailed description of one of the court's earliest and most important cases, the so-called "Trial of the Communist Party," see David Remnick, *The Trial of the Old Regime*, THE NEW YORKER, Nov. 30, 1992, at 104. See also *supra* notes 47-51 and accompanying text.

<sup>95</sup> ROM. CONST. arts. 140, 144 (1991), reprinted in ROMANIA, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 34-35 (1992).

<sup>96</sup> See *Concept for the Constitution of the Republic of Azerbaijan*, § VI (copy on file with the *Ohio State Law Journal*).

<sup>97</sup> See UKRAINIAN CONST. art. 214 (proposed) (copy on file with the *Ohio State Law Journal*).

<sup>98</sup> See *supra* notes 47-51 and accompanying text for a fuller discussion of these similarities.

specialized constitutional court.<sup>99</sup> The Latvian system, however, would not share the diffuse character of the American system with respect to constitutional review.<sup>100</sup>

While there are significant incentives leading these countries to introduce the Austrian system, there are important reasons for the new nations to consider the American model of judicial review. First, the American system may provide a superior design for generating more carefully considered constitutional decisions. There is an important benefit to be reaped from the very number of decisions on a constitutional question. By allowing significant constitutional issues to "percolate" up through the system, the U.S. Supreme Court, for example, enables itself to decide those issues only after they have already received the consideration of a number of other judges. Not only does the Court receive the benefit of the wisdom of the previous decisions, but it is insulated from the obligation to decide simple (though important) or trivial (though difficult) cases. Theoretically, only when a case is both important and difficult does the U.S. Supreme Court exercise authoritative review.

Second, and most importantly, the Austrian system is more properly geared toward a limited form of "structural" judicial review rather than toward the protection of individual rights. If the purpose of judicial review is merely to enforce the constitutional separation of powers and to maintain the proper relation between the various public entities in a federal republic, then a central constitutional court may be able to adequately perform its task. If, on the other hand, the purpose of judicial review is understood to be the protection of individual human rights, then a single constitutional court is unlikely to be capable of responding to the number of constitutional complaints.

This potential inadequacy of constitutional courts in protecting individual rights is a serious problem. Many of the proposed and existing constitutions in the new nations of Central and Eastern Europe are fairly ambitious in the scope of the rights that they protect.<sup>101</sup> On the one hand, it will be difficult, if not

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<sup>99</sup> See *Republic of Latvia Law on Judicial Power*, art. 9 (copy on file with the *Ohio State Law Journal*). Interestingly, the motivation for this choice may be less related to structure than to concern about judicial authority. The Chief Justice of the Latvian Supreme Court, for example, has expressed the view that a divided court system could undermine respect for the decisions of the Supreme Court.

<sup>100</sup> *Id.* (Latvian Supreme Court has exclusive authority to pass constitutional judgments).

<sup>101</sup> See, e.g., UKRAINIAN CONST. art. 29, art. 22 (proposed) (protecting free speech) (copy on file with the *Ohio State Law Journal*); *Concept for the Constitution of the Republic of Azerbaijan*, § III (protecting the right to a "fitting standard of living" and various ecological and civil rights) (copy on file with the *Ohio State Law Journal*); Cutler &

impossible, for constitutional courts to begin to enforce these rights, much less to develop principled bodies of jurisprudence regarding them. On the other hand, the civil and socialist law traditions of these nations make it difficult to adopt fully the American system of diffuse judicial review. Thus, there is a powerful tension between the desires of the new states with regard to the protection of individual rights and the capabilities of their judiciaries in effectively providing that protection.

### 3. *Potential Nonjudicial Solutions to the Individual Rights Dilemma*

While a review of the potential resolution of this tension is beyond the scope of this Article, there are certain intermediate solutions to the dilemma posed by the need to enforce individual rights in nations without the judicial resources to adopt the American structure of judicial review. One of the most popular alternatives to judicial review is the institution of the ombudsperson.<sup>102</sup> In its classic form, this institution is an independent agent or agency whose purpose is to inquire into the administration of government, usually at the behest of individuals aggrieved by that administration.<sup>103</sup> The ombudsperson is most familiar in its Scandinavian form, where it exists in all four Scandinavian nations, but has been established in nations as disparate as New Zealand<sup>104</sup> and Poland.<sup>105</sup> A version of the ombudsperson has also appeared in embryonic form in Great Britain.<sup>106</sup>

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Schwartz, *supra* note 5, at 532–36 (describing breadth of constitutional rights in the Czech and Slovak Federal Republic).

<sup>102</sup> For a fairly comprehensive description of the ombudsperson in European law, see WALTER GELLHORN, *OMBUDSMEN AND OTHERS* (1966). Gellhorn's treatment is thorough, colorful, and insightful, though now substantially dated.

<sup>103</sup> Ombudspersons often also have authority to institute proceedings on their own initiative. See, e.g., Ewa Letowska, *The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)*, 39 INT'L & COMP. L.Q. 206, 207 (1990) (stating that Polish Civil Rights Commissioner may act on own initiative); GELLHORN, *supra* note 102, at 75 (stating that Finnish ombudsmen may initiate investigations).

<sup>104</sup> See GELLHORN, *supra* note 102, at 91–153 (discussing ombudsperson in New Zealand).

<sup>105</sup> See generally Letowska, *supra* note 103.

<sup>106</sup> For a description of the British Parliamentary Commissioner, see Gavin Drewry & Carol Harlow, *A 'Cutting Edge'? The Parliamentary Commissioner and MPs*, 53 MOD. L. REV. 745 (1990). According to Drewry & Harlow, however, there is still a fair amount of dispute as to whether the Commissioner is a true ombudsperson in the Scandinavian tradition or is merely a servant of the House of Commons in fulfilling its obligations to constituents. *Id.* at 765.

The ombudsperson may be superior to a constitutional court in the protection of individual rights because the ombudsperson has a greater capacity to hear individual complaints outside of ordinary litigation. As a result, the ombudsperson may be involved in a broader array of interactions with government officials and the public than would a constitutional court. This greater flexibility may allow the ombudsperson to have a more pronounced practical effect on the behavior of government and even upon public opinion.<sup>107</sup>

The ombudsperson is usually limited, however, to being only an investigatory agent who lacks the authority to independently provide remedies for government misbehavior. The Polish Commissioner for the Protection of Civil Rights, for example, has the authority only to request the assistance of official bodies, including the power to bring cases before the constitutional court.<sup>108</sup> Also, because the ombudsperson responds to individual complaints, the institution runs the danger of becoming an exclusive spokesperson for particularly aggrieved segments of society, such as prisoners, to the exclusion of the rest.<sup>109</sup>

Another alternative to judicial review in protecting individual rights is the authority of the procurator, or public prosecutor. While relatively unfamiliar to legal scholars in the West, the procurator, who is perhaps most similar to the Western notion of the attorney general or prosecutor general, plays a relatively important role in several Eastern nations in supervising the administration and constitutionality of the laws.<sup>110</sup> In Azerbaijan, for example, the proposed

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<sup>107</sup> See GELLHORN, *supra* note 102, at 77 (The repeated interventions of Swedish ombudspersons "have helped mold public opinion concerning such diverse things as free speech, freedom of religion, police restrictions, and penology.").

<sup>108</sup> See Letowska, *supra* note 103, at 207-08.

<sup>109</sup> This was the experience of the Finnish ombudsperson in the early 1960s. According to Gellhorn, the evidence "strongly supports the opinion that the Ombudsman is more 'the prisoners' man' than 'the people's man.'" GELLHORN, *supra* note 102, at 66; see also Letowska, *supra* note 103, at 211-12.

<sup>110</sup> The procurator also looms large in the legal systems of certain Latin American nations. In Costa Rica, for example, the Procurator General is considered to play a large role in the enforcement of constitutional guarantees. See Barker, *supra* note 4, at 267-68.

The potential scope of the procurator's authority is well demonstrated by the authority granted to the Spanish public prosecutor. Pursuant to the Spanish Constitution:

[T]he Public Prosecutor, without prejudice to the functions entrusted to other organs, has the mission of promoting the action of justice in defense of legality, the rights of citizens and the public interest guarded by the law, *ex officio* or on petition by interested parties, as well as watch over the independence of the Courts and to procure before them the satisfaction of social interest.

institution of the procurator would have the authority to make recommendations to the Azerbaijani Constitutional Court regarding the constitutionality of legislation.<sup>111</sup> As a guardian of individual constitutional rights, the procurator enjoys an advantage over the ombudsperson in typically having larger institutional resources with which to respond to constitutional problems. However, because the procurator usually functions as a prosecutor as well, its relationship to the government may be too close to ensure the independence necessary to provide an adequate safeguard for individual rights.

#### B. *The Effect of Judicial Review: Erga Omnes or Inter Partes?*

A second choice faced by a nation developing a system of judicial review is the extent to which constitutional decisions will be binding. Judicial decisions may be binding upon all those subject to the issuing court's jurisdiction (*erga omnes*), or alternatively, they may affect only the parties to the case in which they arise (*inter partes*).<sup>112</sup>

In the United States, people are most familiar with *erga omnes* decisionmaking.<sup>113</sup> Principally, the American comfort with this system derives from its experience with the processes of common-law adjudication. Under the common law, judicial decisions that make law are accepted as part of the ordinary process of judging. By contrast, the classical civil-law system rejected the principle that judges are authorized to make law and, therefore, eschewed the *erga omnes* application of judicial decisions.<sup>114</sup> If a court is only applying the law laid down by the legislature, the theory goes, then there can be nothing in the decision which can add to or modify the law as it stood prior to the decision. Because the result only applies to the parties, the effect of the decision is merely *inter partes*.

The choice as to the effect of judicial review is chiefly related to the structure of the judicial system. If a nation elects only to have a single

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SPAIN CONST. art. 124(1) (1978), reprinted in SPAIN, XVIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 69 (1991).

<sup>111</sup> See *Draft Law on the Procuracy of the Republic of Azerbaijan*, art. 8, § 6 (copy on file with the *Ohio State Law Journal*).

<sup>112</sup> See CAPPELLETTI, *supra* note 79, at 85–88.

<sup>113</sup> The fact that most U.S. courts are limited in their jurisdictional reach (e.g., the decisions of the U.S. Court of Appeals for the Ninth Circuit are not binding upon the district courts of Florida), is not to the contrary. Within the jurisdictional limitation of a given court, judicial decisions on constitutional matters are *erga omnes* unless overruled by a higher court.

<sup>114</sup> See Barker, *supra* note 4, at 254 n.30.

constitutional court responsible for all constitutional adjudication, it will be difficult for that nation to maintain only an *inter partes* rule. It would be anomalous, as well as burdensome, for a constitutional court to repeatedly decide the same constitutional issues only because the parties to the cases differed.<sup>115</sup> For this reason, some nations that have adopted unitary constitutional courts have provided specifically for the *erga omnes* effect of constitutional decisions.<sup>116</sup> Other nations have provided that statutes which are declared unconstitutional in one proceeding are "nullified," which effectively gives the decisions *erga omnes* effect.<sup>117</sup>

### C. *The Timing of Judicial Review: A priori or incidental?*

A third choice is whether judicial review shall occur prior to the promulgation and implementation of a law or executive decree, or only following the implementation of the law or decree.<sup>118</sup> Under one system, known as a priori review, parties are allowed to challenge the propriety—usually with respect to constitutional norms—of statutes and executive decrees in specialized proceedings prior to the promulgation and application of those statutes and decrees.<sup>119</sup> This form of review has a certain hypothetical quality

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<sup>115</sup> This problem would be particularly acute with respect to the criminal law. Under an *inter partes* rule, each person convicted under a law later deemed to be unconstitutional would be required to initiate a separate litigation for release.

<sup>116</sup> For example, in Russia, "[d]ecisions of the RF Constitutional Court shall . . . be binding on all territory of the Russian Federation. DRAFT CONSTITUTION OF THE RUSSIAN FEDERATION art. 103(6) (1992), reprinted in THE RUSSIAN FEDERATION, XV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 48 (1993). Germany has also specifically provided for a partial *erga omnes* effect, making decisions of its constitutional court binding upon public authorities but not necessarily private parties. Zeidler, *supra* note 34, at 520. See also SPAIN CONST. 164(1) (1978), reprinted in SPAIN, XVIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 82 (1991) (decisions of the Spanish Constitutional Court which declare the unconstitutionality of a law "shall be fully binding on everybody").

<sup>117</sup> The Costa Rican Constitution provides that statutes which are unconstitutional are "absolutely void." COSTA RICA CONST. art. 10 (1977), reprinted in COSTA RICA, IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 3 (1982). See also HUNG. CONST. ch. IV, art. § 32/A(2) (1949), reprinted in THE REPUBLIC OF HUNGARY, VIII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 13 (1990) (declaration of unconstitutionality by the Hungarian Constitutional Court "annuls" a statute); ITAL. CONST. art. 136 (1947), reprinted in ITALY, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 82 (1987) (laws declared unconstitutional by the Italian Constitutional Court "cease[] to have effect").

<sup>118</sup> See CAPPELLETTI, *supra* note 79, at 69–77.

<sup>119</sup> See, e.g., art. 61, of the French Constitution:



to it because review takes place in the abstract without a concrete set of facts to which the challenged law or regulation is applied. Typically, standing to initiate such a proceeding is limited to governmental bodies. In France, a priori reference of laws to the *Conseil constitutionnel* is limited to the President, the Prime Minister, the President of the Senate or National Assembly, or any group of sixty senators or deputies.<sup>120</sup>

Alternatively, parties may be limited to challenging government actions only in the context of ordinary litigation, that is, when such a challenge is "incidental" to the litigation. Under the incidental system, a constitutional violation may comprise the gravamen of a plaintiff's complaint, but the presence of the constitutional question is only incidental to the harm which has occasioned the litigation.

The distinction between a priori and incidental review is closely related to the distinction between "abstract" and "concrete" judicial review. Abstract judicial review is a process by which the conformity of laws with higher norms takes place in the abstract, without the trappings of ordinary litigation, though it may take place after the promulgation of the challenged law. Abstract review shares the hypothetical quality of a priori review, and except for its availability after promulgation of a law, is functionally equivalent. Concrete review, like incidental review, occurs only within the context of a specific case whose resolution requires decision of the constitutional question. In practical terms, it is proper to contrast incidental review with both abstract and a priori systems of judicial review.

Unlike the effect of judicial review, the choice of a priori or incidental review is not highly correlated with the division between the civil-law and common-law countries or the choice of a centralized or diffuse system of judicial review. The federal judiciary in the United States, for example, has always exhibited a strong aversion to forms of a priori review, because they are

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Organic laws, before their promulgation, and regulations of the procedure of the Parliamentary Assemblies, before they come into application, must be submitted to the Constitutional Council, which shall rule on their constitutionality.

FR. CONST. art. 61 (1958), *reprinted in* FRANCE, VI CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 40 (1988); *see also* ROM. CONST. art. 144(a) (1991), *reprinted in* ROMANIA, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 34-35 (Romanian Constitutional Court may pass on the constitutionality of laws prior to promulgation).

<sup>120</sup> *See* Vroom, *supra* note 28, at 276. Similarly, in Germany, initiation of abstract review of legislative acts, while not prior to promulgation, is limited to the federal government, a state government, or one-third of the federal legislature, the *Bundestag*. F.R.G. CONST. art. 93(1)(2) (1991), *reprinted in* FEDERAL REPUBLIC OF GERMANY, *supra* note 85, at 127.

similar to the issuance of "advisory opinions."<sup>121</sup> Canada, however, maintains both a common-law tradition and a healthy and robust system of "reference jurisdiction" whose operation is similar to that of a system of abstract review.<sup>122</sup> On the civil-law side, Germany's constitutional court exercises both abstract review (*abstrakte Normenkontrolle*) at the behest of public agencies and concrete review (*konkrete Normenkontrolle*) emerging out of the ordinary litigation process.<sup>123</sup>

The choice of a priori or incidental judicial review is more likely to be reflective of the purposes that judicial review is designed to serve. For example, a priori or abstract review is likely to be more consistent with separation of powers or federalism review than it is with the protection of individual human rights.<sup>124</sup> Conversely, incidental review may be less effective in dealing with separation-of-powers problems.<sup>125</sup>

One very interesting feature of systems of a priori and abstract review is the degree to which they allow for mechanisms of constitutional dialogue between the judicial, legislative, and executive branches of government. In the United States, with its highly formalized system of incidental review, the

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<sup>121</sup> The U.S. tradition of declining advisory opinions began with Chief Justice Jay's refusal to answer certain questions posed to the U.S. Supreme Court by then Secretary of State Thomas Jefferson. See 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (Johnson ed. 1891); 10 SPARKS, WRITINGS OF WASHINGTON 542-45 (1836), reprinted in HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-67 (3d ed. 1988). See also *Muskraat v. United States*, 219 U.S. 346 (1911) (refusing to entertain hypothetical lawsuit despite Congressional authorization). This aversion has persisted despite the fact that several individual states provide advisory opinion jurisdiction for their supreme courts. See, e.g., COLO. CONST. art. VI, § 3; MASS. CONST. art. 2, pt. 2, ch. 3; ME. CONST. art. VI, § 3; N.H. CONST. art. 74, pt. 2; R.I. CONST. art. 10, § 3; S.D. CONST. art. 5, § 5.

<sup>122</sup> See generally James L. Huffman & MardiLyn Saathoff, *Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction*, 74 MINN. L. REV. 1251 (1990) (describing and praising exercise of reference jurisdiction in Canada).

<sup>123</sup> See F.R.G. CONST. art. 93 (1991), reprinted in FEDERAL REPUBLIC OF GERMANY, *supra* note 85, at 127; Kommers, *supra* note 27, at 841.

<sup>124</sup> See Huffman & Saathoff, *supra* note 122, at 1297 ("Given the predominance of federalism issues in reference cases, the reference procedure has played an important role in the constitutional definition of the Canadian federal system."). One commentator, however, has asserted that the French experience is proving the compatibility of a priori review with protecting individual freedom. Vroom, *supra* note 28, at 266.

<sup>125</sup> See Huffman & Saathoff, *supra* note 122, at 1312 ("In contrast, the case law approach is confined to specific factual controversies, litigants, and remedies; it may not provide a sufficient frame of reference to prevent erosion of a federation's jurisdictional spheres.").

exchange between the judiciary and the political branches regarding the constitutionality of various measures is extremely limited. In reviewing the constitutionality of legislative or executive activity, American courts address constitutional questions on the assumption that the judicial decision on the issue is the last word on the subject.<sup>126</sup> If the challenged measure is deemed to be unconstitutional, it is invalidated; if not, it is upheld, and the court's decision with respect to constitutionality is final.<sup>127</sup> In the course of its decision, the court may occasionally invite the legislature or executive to reconsider the measure in light of the holding, but that is the extent of the exchange.<sup>128</sup> Certain American judicial doctrines, like the clear statement rule,<sup>129</sup> may serve a minimal dialogic role, but these are relatively trivial.<sup>130</sup>

In contrast, systems of a priori and abstract review offer much richer opportunities for interaction between the various branches of government. Unlike incidental judicial review, these forms of review do not arise in the

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<sup>126</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

<sup>127</sup> One commentator has argued in favor of eliminating the finality of U.S. Supreme Court decisions in certain circumstances. See Daniel Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9 (1985) (arguing for nonfinality of decisions based on "nonoriginalist" individual rights).

<sup>128</sup> Even this possibility is generally considered unrealistic in the present U.S. system, as Congress seems relatively loath to take action following a judicial interpretation of a statute. See John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are no Different from Legislatures*, 77 VA. L. REV. 747, 861 (1991).

<sup>129</sup> According to the clear statement rule, the Supreme Court will invalidate executive action that may infringe upon constitutional rights when there is doubt as to whether Congress had actually authorized the executive's behavior. In *Kent v. Dulles*, 357 U.S. 116 (1958), for example, the Court invalidated the Secretary of State's denial of certain passports. The Court was concerned that Congress had not intended to grant the Secretary "unbridled discretion" in this area when such discretion could trench on the constitutional right to travel. Decisions like the one in *Dulles* facilitate constitutional discussion between the Court and Congress because they leave open the possibility for Congress to reconsider its decision in light of the possible constitutional infringement. Only if Congress makes its intentions explicit will the Court actually address the question of whether a constitutional violation has taken place.

<sup>130</sup> Alexander Bickel's famous "passive virtues" may perform a role in generating space for a limited form of "dialogue" between the U.S. Supreme Court and Congress. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962). By employing doctrines such as ripeness and mootness, the Court may effectively delay decision in certain cases, in the hopes that Congress (or the responsible state legislature) will remedy the constitutional deficiency on its own initiative.

context of a specific case. Without the time pressure associated with the need for a decision, they allow for the possibility of a period of exchanges between the judiciary, the legislature, and the executive branches. A priori review also has the advantage of occurring prior to the promulgation of a statute or executive decree. Because the questioned law is not yet in effect, all of the relevant actors have substantially more leeway in developing solutions to any constitutional problems.

The new nations of Central and Eastern Europe have already begun to exploit this aspect of a priori and abstract review as a method of defusing constitutional dispute. The constitutional dialogue between the judiciary and the legislature is particularly developed in Poland. There, the Constitutional Tribunal may review legislative acts a priori on the motion of certain government agents.<sup>131</sup> If the tribunal makes a determination of unconstitutionality, the law is returned directly to the Polish legislature, the *Sejm*, for reconsideration.<sup>132</sup> If the parliament re-enacts the law with a specified qualified majority, the new law is promulgated despite the tribunal's determination of unconstitutionality. The new law is then treated as an amendment to the Polish Constitution, so the unconstitutionality of the law is in fact removed.<sup>133</sup> Thus, in Poland, the dialogue between the court and the legislature in considering the constitutionality of legislation is codified in positive law and is part of the constitutional amendment process.

Similar dialogic systems are in place in other nations with constitutional courts. In Germany, for example, the Federal Constitutional Court has in fact permitted unconstitutional laws to remain in effect pending legislative action. In such cases, the unconstitutional statute is only invalidated if the legislature fails to act by a given deadline.<sup>134</sup>

These forms of extensive constitutional dialogue have several advantages when contrasted with the more limited American system. First, they extend the hope of forestalling constitutional violations before they occur. If constitutional violations can be addressed a priori, or in the abstract, they perhaps can be remedied before any real injury is inflicted. Second, such dialogue may also foster a higher degree of constitutional responsibility on the part of legislators. By being required to respond to constitutional concerns, legislators will be

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<sup>131</sup> See POL. CONST. art. 27(4) (1991) (President may submit laws to Constitutional Tribunal for examination), reprinted in POLAND, *supra* note 92, at 12.

<sup>132</sup> POL. CONST. art. 33a(2) ("Judgments of the Constitutional Tribunal on non-conformity of laws are subject to examination by the *Sejm*."), reprinted in POLAND, *supra* note 92, at 17.

<sup>133</sup> See Hartwig, *supra* note 2, at 455.

<sup>134</sup> See Zeidler, *supra* note 34, at 517 (describing the dialogue between court and *Bundestag* in resolving the constitutional aspects of income taxation).

introduced to constitutional principles whose impact they may not have otherwise considered.<sup>135</sup> Finally, constitutional dialogue of this sort may increase the efficiency of the legislature in performing its own task. A series of exchanges between the court, the legislature, and the executive may help focus a variety of the issues surrounding a given enactment and result in better legislation. The legislature may also benefit from a precise analysis of the present state of the law by legal experts in the judiciary.<sup>136</sup>

#### D. *Standing*

One of the most important choices facing a nation instituting judicial review is defining the parties who will have the ability to trigger review. Unlike the previous choices discussed above, there is an almost unlimited set of options with regard to this issue. The choices range from limited standing restricted to a few organs of the government to broad standing allowed for any person who is aggrieved by an allegedly unconstitutional act.

The issue of standing is closely related to the choice of judicial system and the timing of judicial review, primarily due to concerns regarding the burdens that are to be placed upon the judiciary. In a system that relies upon a single constitutional court, it may be necessary to limit the parties who will have access to the court's judgment. In Bulgaria, for example, individual access is denied to the constitutional court for precisely this reason.<sup>137</sup> One commentator has predicted that in Hungary, where access to the constitutional court is open to everyone, including foreigners, regulation of constitutional complaints will be necessary in the future.<sup>138</sup>

When review is available on an a priori basis, it may be necessary to limit the number of parties that have legal authority to bring a challenge prior to the

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<sup>135</sup> According to one commentator, in France "[l]egislative consideration of constitutional norms has thus increased in proportion to the *Conseil Constitutionnel's* activism in pronouncing these norms." Vroom, *supra* note 28, at 320.

<sup>136</sup> As Lord Campbell once reportedly advised his fellow members of the House of Lords: "[You] may be called on, in your legislative capacity, to change the law and before doing so it is proper that you should be satisfied beyond a doubt what the law really is." *In re* References by the Governor-General in Council, 43 S.C.R. 537, 549 (Can. 1910).

<sup>137</sup> See BULG. CONST. art. 150 (1991) (limiting access to constitutional court to government officials), *reprinted in* REPUBLIC OF BULGARIA, III CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 116 (1992). *But see* BULG. CONST. art. 120(2) (allowing broad access to judicial review for individuals affected by administrative actions).

<sup>138</sup> See Hartwig, *supra* note 2, at 461. A similar prediction has been made with respect to the constitutional court of the Czech and Slovak Federal Republic and its broad standing rules. Cutler & Schwartz, *supra* note 5, at 540.

promulgation of a law. If any citizen had the right to challenge laws prior to promulgation, most laws might never be enacted. As noted above, in France and in Germany, a priori review may be initiated only by a few select members of the government.<sup>139</sup>

In a system with a diffusion of responsibility for judicial review, however, standing may be more broadly available due to the number of courts that have authority to decide constitutional cases. The United States, for example, has fairly broad standing rules that effectively allow individuals to bring abstract challenges.<sup>140</sup> As of yet, the American court system has not been markedly overburdened with constitutional cases.<sup>141</sup>

#### IV. THE RELATIONSHIP OF DEMOCRACY TO JUDICIAL REVIEW

Turning from the practical aspects of institutional design, a comparative analysis of judicial review is properly concluded with some brief commentary on one of the basic theoretical questions associated with judicial review. This question is the relationship of the institution of judicial review (in its various forms) to the general notion of democracy. As described below, the classical understanding of the problem has been that judicial review is inherently "anti-democratic" and must, therefore, be "resolved" with democratic theory in some coherent and legitimate fashion. The question as to whether such a "counter-majoritarian" difficulty exists, and if it does, what is to be done about it, are key to the operation of a system of judicial review. While these questions may appear to be highly abstract, they do, in fact, relate directly to the practical enterprise of establishing a system of judicial review.

Of course, this Article does not presume to engage in a complete canvassing of the voluminous literature available on the relationship between judicial review and representative government.<sup>142</sup> Instead, its discussion of

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<sup>139</sup> See *supra* note 120 and accompanying text; see also ROM. CONST. art. 144(a) (1991), reprinted in ROMANIA, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana) 34-35 (1992) (right to initiate a priori review limited to certain governmental bodies).

<sup>140</sup> See, e.g., *United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973) (allowing standing to law students in challenging environmental effects of railway surcharges on recreational facilities in Washington, D.C.). But see *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136-37 (1992) (describing potentially more stringent standing analysis).

<sup>141</sup> The claim that the U.S. courts, particularly the federal, are overburdened is frequently heard, but this is more likely due to the tremendous number of drug cases than to the breadth of American standing law.

<sup>142</sup> This literature has been described as "library-size[d]." Cappelletti, *supra* note 3, at 410 n.6.

these issues is primarily to demonstrate some of the practical consequences that this academic debate may have for nations attempting to develop their own systems of judicial review. In presenting these issues, this Article divides a number of theories of judicial review into two categories: those that focus on the apparent tension between judicial review and democracy and those that perceive judicial review as an important or necessary feature of democracy. To a great extent, these categories are naive and artificial because the theories that they encompass are complex and often overlap in significant ways. Functionally, however, they capture a great deal about the variety of theories of judicial review and democracy.

### A. *Traditional "Counter-Majoritarian" Thought*

#### 1. *The Operational Role of Courts*

Traditional constitutional theory has posited that the institution of judicial review is inherently antidemocratic in that it is employed primarily to thwart the will of a democratically elected and "representative" legislature. In Alexander Bickel's words, "nothing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy."<sup>143</sup> In order for the institution to be legitimated, therefore, some reconciliation between its antidemocratic nature and the general theory of democracy must be achieved. In this view, judicial review may survive only if it performs some salutary purpose within the general framework of democracy. The classic formulation of the task of legitimizing judicial review was also provided by Bickel:

The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.<sup>144</sup>

This enterprise has taken a number of different forms. In general, the arguments in favor of judicial review, despite its apparent conflict with democratic principles, fall into two categories: those that attempt to fulfill the task set out by Bickel and those that attempt to resolve the problem by reformulating it so as to eliminate the difficulty altogether.

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<sup>143</sup> BICKEL, *supra* note 130, at 18.

<sup>144</sup> BICKEL, *supra* note 130, at 24.

## 2. *The Preservation of Principle*

Bickel's own response to the task he set forth was the recognition of judges as performing a unique role in the elucidation and application of "principle" to political problems. For Bickel, one of the fundamental problems with representative government was reconciling the need for "expediency" (the solutions to the immediate problems of the day) with the need for "principle" (the underlying values on which a given society is based). These needs were reconciled by giving judges the authority to invalidate the expedient solutions created by the political branches on grounds of principle. Judges, particularly those sitting on the Supreme Court, were expert at this task because "[j]udges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."<sup>145</sup>

Bickel's resolution of the counter-majoritarian difficulty has some interesting implications for the institution of judicial review. First, in the new states of Central and Eastern Europe, it suggests the desirability of a centralized constitutional court. If the purpose of judicial review is to infuse the political process with principle, then the power should be exercised only by those with the independence to occasionally oppose the will of the majority. As we have seen, in the classical civil-law system and the socialist legal system, judges typically do not have the training to exercise such independence. A unitary court, however, could be comprised of those unique individuals who could, when circumstances demand, stand up to the legislature and the executive. Furthermore, ordinary judges are less likely to have the requisite leisure to engage in the sort of philosophical inquiries that Bickel demands of judges exercising judicial review.

Second, Bickel's solution strongly suggests that career judges may not always be the most appropriate choices for judicial review authority. Such individuals will be experienced in the day-to-day minutiae of judicial administration but may not be qualified for the highly abstract and philosophical task of deriving the fundamental values of a society. The appropriate Bickellian constitutional court, then, might be comprised of individuals from a variety of academic and philosophical backgrounds. For this reason, perhaps, many of this nation's most famous Supreme Court justices have been academics rather than career judges.<sup>146</sup>

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<sup>145</sup> BICKEL, *supra* note 130, at 25-26.

<sup>146</sup> Oliver Wendell Holmes, Louis Brandeis, Harlan Fiske Stone, Felix Frankfurter, and William O. Douglas, for example, all taught law prior to their judicial appointments. See SIDNEY H. ASCH, *THE SUPREME COURT AND ITS GREAT JUSTICES* 83, 107, 128, 160, 211 (1971).



Finally, Bickel's judicial function is highly compatible with abstract and a priori review. The chief disadvantage of a priori review is its disassociation from concrete facts, but if the purpose of review is to ensure conformity with abstract social principles, then the existence of concrete facts may not be essential. Statutes could be effectively reviewed for conformity with principle because those principles are by definition abstract.

### 3. *The Fallacy of Democracy*

An alternative response to the "counter-majoritarian difficulty" is simply to deny that democracy has any meaning, or, at least, any meaning to the modern world. Some constitutional experts note that many features of modern government are not particularly democratic and argue that we should not be particularly concerned about the "non-democraticness" of any particular one feature, including judicial review.<sup>147</sup> These experts point out that most modern governments bear little resemblance to the classic ideal of democracy, even in a representative form.<sup>148</sup> In their view, modern government is comprised of a heterogeneous amalgam of officials who fall along a fairly wide spectrum of public responsibility; it is not a "democracy."

The U.S. government, for example, exhibits a number of institutions and practices that are not strictly democratic. Most obviously, the members of the U.S. Senate are elected not democratically on the basis of population, but geographically as representatives of their respective states.<sup>149</sup> Furthermore, the large administrative bureaucracies characteristic of modern government are not elected and are almost totally unrepresentative. Given the pervasive presence of nondemocratic government, theorists conclude that any concerns one might

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<sup>147</sup> See, e.g., Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-77 (1989).

<sup>148</sup> See Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 6 (1991) ("[C]lassic participatory democracy—even a representative version—is at best a theoretical ideal, unattainable in the modern, highly populated, transnational world."); HARRY WELLINGTON, *INTERPRETING THE CONSTITUTION* 28 (1990) ("If we move from the deep structure of the Constitution to regular and accepted practice within, say, the legislative branches of the federal government, we find further dilution of any simple notion of majority rule or electoral accountability.").

<sup>149</sup> Of course, senators are elected democratically within their geographic constituencies, though even this was not the case when the U.S. Constitution was ratified. Prior to the ratification of the 17th Amendment, senators were elected by their state legislatures. See U.S. CONST. art. 1, § 3.

have about judicial review should not derive from a suspicion of its inherent "antidemocratic" nature.<sup>150</sup>

The results of this recognition of the nondemocratic aspects of modern government are largely empty regarding the appropriate scope of judicial review.<sup>151</sup> In theory, any form of judicial review may be compatible with modern democratic government because there really is no such beast as true democratic government. Some forms of judicial review may be better or worse, but not because of their relative impacts on the character of democratic government.

In terms of the developing nations of Central and Eastern Europe, this easy answer to the counter-majoritarian difficulty may be unsatisfactory. To accept the argument fully, it is necessary first to abandon the idea that democracy has important normative force, at least as an ideal. In essence, the theory contends that the only democratic justification for judicial review is that it is no less democratic than ordinary bureaucracy. For new societies eager to embrace democratic self-government, this form of legitimation may be sorely insufficient.

### *B. Notions of Democratic Constitutionalism*

For this reason, the growing interest in the democratic features of judicial review may be particularly appealing to the new nations of Central and Eastern Europe. Over the years, a number of scholars and judges have concluded that judicial review is not only compatible with democratic self-government, but it is, in fact, a necessary component of such government. According to this line of thought, judicial review plays an important role in the creation and perpetuation of constitutional democracies and, therefore, can be understood as an essentially democratic practice.

Two distinct reasons for the necessity of judicial review in a democracy have been posited. First, judicial review may be a form of democratic enforcement that protects the "deeper" democratic judgments of the people expressed in a constitution from the vicissitudes of temporary majorities (or the more representative judgments of the legislature against the irresponsible decisions of government bureaucrats). Second, judicial review may be

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<sup>150</sup> See WELLINGTON, *supra* note 148, at 30 ("The prevalence of nonmajoritarian decisionmaking in America suggests that the anxiety some have about judicial review cannot be fully explained by the fact that it is (as Bickel insisted) a deviant institution in American democracy.").

<sup>151</sup> This is not to suggest that adherents to this view do not themselves have their own preferences regarding judicial review. Instead, it is only to indicate that the view itself does not require any particular conclusion.

necessary to protect the values that are "required" by democracy itself, even if those values are not expressed within a constitution. These theories are unified only in their belief that without judicial review, the practice of democracy may be imperiled.

### 1. *In Defense of the "Will of the People"*

Some theorists argue that enforcement of a constitution against a present legislative majority is actually prodemocratic because it "preserves" the validity of democratically created values against less than perfectly representative legislatures.<sup>152</sup> This argument has a distinguished lineage in the United States, dating to the debates over ratification of the Constitution. In *The Federalist Papers*, Alexander Hamilton based his rationale for judicial review on the theory that in declaring a legislative act void, the judiciary was merely acting to keep the legislature within the limits democratically established by the people of the United States.<sup>153</sup>

This argument has also been appealing to European constitutional scholars in recent years. In defending the development of judicial review in France, Professor Louis Favoreu has argued: "[If] the law does not conform to the Constitution, it is not the expression of the general will. A majority of elected deputies cannot defeat what has been established in favor of a much larger consensus."<sup>154</sup>

This defense of the institution of judicial review has interesting implications for the scope of that power. First, under its theory, the appropriate nature of judicial review in any country will be highly contingent upon the actual content of the country's constitution. If the constitution is entirely structural, then defending the will of the people can easily be performed by a single constitutional court. If the constitution is generous in its protection of individual rights, as are many of the new states of Central and Eastern Europe, however, the project of constitutional enforcement may require a number of courts with the authority to invalidate legislative and executive actions. Second, standing rules would necessarily have to be fairly broad. Because the premise of this defense of judicial review is that the representative branches of the government are inadequately reflecting the more enduring wishes of the populace, standing should not be limited to agents of those representative

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<sup>152</sup> For a recent exposition of such a view, see BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–16 (1992).

<sup>153</sup> See *THE FEDERALIST PAPERS*, *supra* note 73, at 229, 231.

<sup>154</sup> See Vroom, *supra* note 28, at 305–06 (quoting Favoreu, *Le Droit Constitutionnel jurisprudentiel en 1981–1982*, 1982 R.D.P. 359, 435).

branches. Instead, at some juncture, standing for ordinary citizens will be required.

## 2. The Existence of "Fundamental" Democratic Values

In contrast, other theorists have taken the position that, in fact, democracy itself requires the protection of certain critical fundamental values, irrespective of whether those rights are contained in a written constitution.<sup>155</sup> In their view, societies without these rights cannot properly be characterized as democratic.<sup>156</sup> Judicial review is only the process by which the essential democratic nature of a society is protected from the potential tyranny of temporary legislative majorities. The institution is, therefore, not counter-majoritarian because it is quintessentially prodemocratic.

Of course, the scope of the rights that are absolutely necessary to democracy varies considerably. Some theorists assert that "equality" of the citizenry is indispensable to the definition of democracy.<sup>157</sup> Perhaps most visibly, John Hart Ely has taken the position that the democratic function of judicial review is to protect those rights directly relating to the functioning of the political process.<sup>158</sup> These rights must be guarded by judicial review in a democratic society because, otherwise, the democracy could not function properly.<sup>159</sup> Justice Thurgood Marshall has fused these two lines of thought. In

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<sup>155</sup> "The case is made that the liberal democratic society rests, at bottom, on certain basic ideals—free speech and discussion, freedom of association, freedom of conscience—and that when these are threatened by executive-legislative authority it is absurd to rest on any abstract, academic conception of the Separation of Powers and say that the judges may not properly intervene in protection of them." MCWHINNEY, *supra* note 60, at 215.

<sup>156</sup> See, e.g., MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 71 (1988) (citing John Rawls and Robert Nozick as examples); AHARON BARAK, JUDICIAL DISCRETION 195 (1989) (Democracy "is not simply majority rule. . . . It is the realization of certain fundamental values, such as basic human rights.").

This "rights" understanding of democracy has been vigorously attacked by Schumpeter: "Democracy is a political *method*, that is to say, a certain type of institutional arrangement for arriving at political—legislative and administrative—decisions and hence incapable of being an end in itself, irrespective of what decisions it will produce under given historical conditions." JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 242 (1950).

<sup>157</sup> See, e.g., Robert Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 455 (1984) ("equality is a bedrock substantive principle of democratic theory").

<sup>158</sup> See generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

<sup>159</sup> *Id.* at 101–03.

*San Antonio Independent School District v. Rodriguez*<sup>160</sup> he argued that relative equality in education was a necessary prerequisite to democratic participation in politics and was, therefore, constitutionally required.

The implications for judicial review of this sort of theorizing is contingent upon the particular theory that is being considered. Political process-based theories like Ely's are more compatible with single court, a priori review than are "fundamental democratic values" theories of judicial review. Schemes based on inherent fundamental rights like equality are likely to be difficult for unitary constitutional courts. Abstract or a priori review will also likely be ineffective in protecting fundamental individual rights. Abstract review will have difficulty discerning the tremendous variety of ways in which various fundamental individual rights may be threatened by any given measure.

### C. *The Dangers of Judicial Review to Democracy*

No discussion of the relationship between judicial review and democracy would be complete without a discussion of a school of thought that entirely rejects judicial review on grounds of incompatibility with democracy. In a sense, this view takes Bickel's counter-majoritarian difficulty so seriously that it is willing to jettison the institution of judicial review entirely in favor of majoritarian supremacy.

The core of this democratic objection to judicial review is the belief that responsibility is the only means by which people can learn to govern themselves. Through the process of self-government, and the occasional failure, people learn moral responsibility and thereby attain the potential to govern themselves effectively. "Participation in the process of government uplifts the participants in their knowledge and sensitivity to the needs of others, enhances their sense of mature responsibility, and fully integrates each individual into the community."<sup>161</sup>

The problem with judicial review, in this view, is that it partially relieves the people of responsibility for their political choices. The classic statement of this view was stated by James Bradley Thayer:

[T]he exercise [of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the

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<sup>160</sup> 411 U.S. 1, 113-17 (1973) (Marshall, J., dissenting).

<sup>161</sup> See Ides, *supra* note 148, at 4 (describing Rousseau's attitude toward democracy).

political capacity of the people, and to deaden its sense of moral responsibility.<sup>162</sup>

The danger of this "deadening" of moral responsibility is its tendency, paradoxically, to expose the populace to precisely the same sort of majoritarian dictatorship that judicial review is supposed to prevent. By reducing the political capacity of the people to govern themselves on day-to-day matters, judicial review may inhibit the ability of the people to respond responsibly when serious threats to their political liberty emerge. This is critical, because judicial review is likely to be a thin line of defense against a truly significant threat to liberty, such as the rise of fascist nationalism or the eruption of social chaos.<sup>163</sup>

Similar views have been expressed in support of the continuation of the British system of parliamentary supremacy. In his essay *The Political Constitution*, J.A.G. Griffith argues against instituting American-style judicial review in Great Britain. He asserts that judicial review, whether based on a Bill of Rights or upon some idealized "moral consensus," would not save the people of Great Britain from legislative tyranny; instead, it would only mask the existing real political disagreements.<sup>164</sup> According to Griffith, only the robust exercise of political rights, unencumbered by a judicial prop, can provide a permanent platform for the protection of liberty.<sup>165</sup>

These observations, while worthy of attention, are not usefully applicable to the present situation in Central and Eastern Europe. An experiment with parliamentary supremacy in the new nations of Central and Eastern Europe would be highly inappropriate. It is certainly true that the institution of judicial review cannot provide salvation for a nation bent on destroying the political and civil liberties of a minority of its citizens. It also seems certain, however,

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<sup>162</sup> *Id.* at 24 (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (1901)).

<sup>163</sup> As Justice Robert Jackson wrote,

I know of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions. . . . No court can support a reactionary regime and no court can innovate or implement a new one. I doubt that any court, whatever its powers, could have saved Louis XVI or Marie Antoinette. None could have avoided the French Revolution, none could have stopped its excesses, and none could have prevented its culmination in the dictatorship of Napoleon.

ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80 (1955).

<sup>164</sup> J.A.G. Griffith, *The Political Constitution*, 42 MOD. L. REV. 1, 16, 19 (1979).

<sup>165</sup> *Id.* at 16.

that the success of nonjudicial review nations, like Great Britain, is largely due to the existence of traditions of adherence to the "rule of law." In the new states, there is no such tradition. Under such circumstances, judicial review would seem to be an absolutely necessary safeguard of whatever form of democratic self-government those nations choose to adopt. A doctrine of legislative supremacy without a tradition of the rule of law could be extremely dangerous.<sup>166</sup>

This Article has only begun to sketch the implications of various theories of judicial review within the framework of democracy as it exists in the West. As the new nations of Central and Eastern Europe move forward in their development, the details of the sketch will become clearer and some issues will be resolved. Doubtless the new nations will generate their own understandings of judicial review and democracy, and this will likely create new issues which will need to be explored. The important observation of this discussion, however, is that the theoretical underpinnings of judicial review can have a critical impact on the appropriate structure of the institution. These theoretical considerations should not be ignored in the illusory belief that they are irrelevant to practical questions of institutional design.

## V. CONCLUSION

The new nations of Central and Eastern Europe are now engaged in the critical task of forming the institutions that will determine the shape of their societies for years to come. In doing so, they look to the West for information and precedents and are attempting to derive what they can from Western experiences, both good and bad. The comparative analysis of institutions, like the analysis of judicial review contained in this Article, is an important part of this endeavor.

For the new nations, perhaps the most useful aspect of Western government is its experience with the principles of separation of powers and the protection of individual human rights. Not only have the democracies of the West had several centuries of experience with these principles, but they represent working models of how theory is to be translated into practice. The Western systems have had centuries to develop a variety of reactions to the problems of government. Reflection on the successes and failures of the West can provide a significant resource for the new states in creating their own indigenous institutions.

This Article has attempted to perform such a task with respect to the institution of judicial review. As it has indicated, there are a number of critical

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<sup>166</sup> See *supra* notes 57-63 and accompanying text.

choices facing new nations interested in establishing judicial review, many of which are closely interrelated. The choices actually made by any individual nation, of course, will necessarily be based upon local conditions and upon the objectives that the people of that nation set for their new governments.

Among the most difficult choices in the new states of Central and Eastern Europe will be the prospect of adequately protecting individual human rights. Many of the new constitutions of these states are quite broad in their protection of individual rights. While these states may have a deep commitment to the protection of individual rights, there are significant problems with creating mechanisms by which that commitment can be transformed into enforcement. Those nations whose legal traditions are the product of the civil-law and socialist legal systems may not be prepared for the adoption of judicial review on the scale that may be necessary for the adequate protection of the rights which the new states would like to guarantee. These nations may suffer from the absence of a culture of the rule of law, from a lack of jurists with the qualifications to exercise judicial review, and from political elements unaccustomed to accepting judicial interference.

This problem, the protection of individual rights in societies ill-equipped to adopt broad judicial review, is profoundly deserving of further study. The various institutions that have emerged to protect individual rights in other nations, including the ombudsperson, the procurator, and the independent bar, need to be examined in greater detail to determine to what extent these institutions can be employed in Central and Eastern Europe. Through the process of comparative analysis, perhaps even new variants of these organizations can be developed that are consistent with the traditions and needs of the new countries and that offer full protection of individual human rights.

The process of change moves slowly. The influence of Communism and its practices has been pervasive and has made it difficult to immediately create new and innovative solutions to many of the problems of Central and Eastern Europe. As a result, many of the organizations and institutions presently in existence may find themselves transformed and may eventually disappear entirely. This flux may be frustrating to those who hope to see the quick and easy rise of solid and stable constitutional democracies in the wake of the Soviet Empire. It should be remembered, however, that free nations are built not only upon the demise of tyrannical ones, but also upon the persistent efforts of those who believe in the value of liberty and are willing to labor in the pursuit of the vindication of that belief.